Office - Supreme Court, U.S.
FILED
OCT 1 1956
JOHN T. FEY, Clerk

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956

No. 473

PAUL W. HEISEY,

Appellant,

vs.

COUNTY OF ALAMEDA; CITY OF OAKLAND; RUSSELL C. HORSTMANN, as County Assessor of Alameda County; ROGER COIT, as County Treasurer of Alameda County; EDWIN MEESE, JR., as County Tax Collector of Alameda County; CHESTER STANLEY, as Chairman of the Board of Supervisors of Alameda County; CLIFFORD RISHELL, as Mayor of the City of Oakland; THE ROMAN CATHOLIC WELFARE CORPORATION OF SAN FRANCISCO, Intervenor,

Appellees.

Appeal from the Supreme Court of the State of California.

STATEMENT AS TO JURISDICTION.

HENRY C. CLAUSEN,
315 Montgomery Street, San Francisco 4, California,
Counsel for Appellant.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Page

The opinion below 2

Jurisdiction 2

Questions presented 5

Statement 9

The federal questions are substantial 18

I. The California statute contravenes the establishment of religion clause of the First Amendment by forcing public tax support for, and using the force of the tax system to promote non-public, undercollegiate, sectarian schools, competitive to the public schools, and indoctrinating religious dogma prohibited in the public schools 18

II. The statute contravenes the equal protection or due process clauses of the Fourteenth Amendment by forcing appellant and other taxpayers who are proscribed from sectarian indoctrination in the public schools to support non-public schools which compete with the public schools and instruct on the very sectarian subjects forbidden in the public schools..... 30

III. The statute contravenes the due process clause by forcing appellant and those similarly situated to pay additional taxes and thus be deprived of property for a non-public purpose. The benefited non-public schools are conducted primarily to advance sectarian doctrine which is not a public purpose but actually forbidden by law as an object of public school support..... 33

IV. The statute contravenes the Fourteenth Amendment on other grounds 37

V. Both the Alameda County Superior Court and the California Supreme Court erred prejudicially in excluding and refusing to consider and make findings on Plaintiff's Exhibits 5 and 6, comprising textbooks used in said Roman Catholic, non-public undercollegiate schools, and the testimony on Roman Catholic canoni-

Page

cal law, offered in evidence to augment proof and judicial knowledge of the purpose, type and extent of teaching and instruction on sectarian doctrine in such sectarian schools as would be exempt under the statute 39

Conclusion 42

Table of Authorities Cited

Cases

Pages

Brainard v. Town of Colchester, 31 Conn. 407 26

Brown v. Board of Education, 347 U.S. 483 ..... 6, 31, 32

Charleston Federal Savings & Loan v. Alderson, 324 U.S. 182, 89 L.Ed. 857 16

Citizens Sav. & L. Assn. v. Topeka, 20 Wall. 655, 22 L.Ed. 455 34

Commonwealth v. Thomas, 119 Ky. 208, 83 S.W. 572 22

Everson v. Board of Education, 330 U.S. 1, 91 L.Ed. 711 ..... 3, 5, 19, 22, 23, 25, 27, 29, 39

Franklin Street Society, The v. Canchester, 60 N.H. 342 26

Garrett Biblical Institute v. Elmhurst State Bank, 331 Ill. 308, 163 N.E. 1 (1928) 27

Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203, 92 L.Ed. 649 ..... 3, 5, 20, 22, 24, 27

Largent v. Texas, 318 U.S. 418, 87 L.Ed. 873 17

Orr v. Baker, 4 Ind. 86 22

People ex rel. Auditor v. Illinois Cent. R. Co., 119 Ill. 83, 6 N.E. 469 22

Roman Catholic Welfare Corporation v. City of Piedmont, 45 C.2d 325, 289 P.2d 438 ..... 24, 33

Thompson v. Consolidated Gas Utilities Corp., 300 U.S. 55, 57 S.Ct. 364, 81 L.Ed. 510 34

Trustees of Griswold College v. State of Iowa, 46 Iowa 275, 26 Am. Rep. 138 (1877) 27

Williams v. Bruffy, 96 U.S. 176, 24 L.Ed. 716 3

Zorach v. Clauson, 343 U.S. 306, 96 L.Ed. 954 ..... 6, 20

Constitutions

California Constitution:

Article VI, Section 4¾ 16

Article IV, Section 30 34

Pages

Article XIII, Section 1 ..... 10, 15, 37
Article XIII, Section 1c 10
Article XIII, Section 15 33
Article IX 33
Article IX, Section 8 ..... 24, 30, 33
Article XVI, Section 15 33

Statutes

California Code of Civil Procedure, Section 956(a) 16
California Education Code, Section 8273 30
California Revenue and Taxation Code, Section 214 ..... 9, 10, 32
1 Statutes of California, 1951:
Chapter 242, Section 1 2
Chapter 242, Section 1, pages 502-503 3
28 U.S.C.A., Section 1257(2) 3

Rules

Rules on Appeal, Rule 23 (36 C. 2d 1, 20) 16, 41

Texts

Baker, Tax Exemption Statutes, 7 Tex. L. Rev. 50 22
Bouscaren and Ellis, Canon Law (1951), pp. 761-767 29
V The Catholic Encyclopedia (1925), p. 304 12
XIII The Catholic Encyclopedia, p. 555 12
XIV The Catholic Encyclopedia, p. 253 29
Note, Catholic Schools and Public Money, 50 Yale L. J. 917, 922 ..... 22, 25
Note, Constitutionality of Tax Benefits Accorded Religion, 49 Col. L. Rev. 968, 985 22
Note, "Establishment of Religion Clause Applied to the States", 33 Cornell L. Q. 122, 128 23
"Encyclical Letter, Pius XI, December 31, 1929, on Christian Education of Youth", Four Great Encyclicals (Paulist Press), p. 63 29

Pages

Hunter, Tax Exemption—A Subsidy, 8 Tax. Magazine 332, 351 21

Note, 45 Mich. L. Rev. 1001, 1019-1020 23

Paulsen, "Preferment of Religious Institutions in Tax and Labor Legislation", 14 Law and Contemp. Prob. 144.... 22

Pfeffer, Church, State and Freedom, 183-190 (1953)..... 22

Note, Establishment of Religion by State Aid, 3 Rutgers L. Rev. 115, 121-123 23

Ryan and Boland, Catholic Principles of Politics (1952), p. 320 39

Stimson, The Exemption of Property From Taxation in the U. S., 18 Minn. L. Rev. 411, 419 .....21, 26, 28

II Woywood, A Practical Commentary On The Code of Canon Law (1925), pp. 117-120 29

Note, 61 Yale L. J. 403, 406-407 23

Zollman, Tax Exemptions of American Church Property, 14 Mich. L. Rev. 646, 652-653 27

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1956

No.

PAUL W. HEISEY,

Appellant,

vs.

COUNTY OF ALAMEDA; CITY OF OAKLAND; RUSSELL C. HORSTMANN, as County Assessor of Alameda County; ROGER COIT, as County Treasurer of Alameda County; EDWIN MEESE, JR., as County Tax Collector of Alameda County; CHESTER STANLEY, as Chairman of the Board of Supervisors of Alameda County; CLIFFORD RISHELL, as Mayor of the City of Oakland; THE ROMAN CATHOLIC WELFARE CORPORATION OF SAN FRANCISCO, Intervenor,

Appellees.

Appeal from the Supreme Court of the State of California.

STATEMENT AS TO JURISDICTION.

Appellant Paul W. Heisey submits his statement disclosing in particular the basis upon which this

Court has jurisdiction on appeal to review the split—4 to 3—decision of the Supreme Court of the State of California in Cause No. SF 19,026, which reversed a judgment of the Superior Court of the State of California in and for the County of Alameda.

THE OPINION BELOW.

The opinion of the California Supreme Court is reported in 46 A. C. 648 and 298 P. 2d 1. Copies of the majority and dissenting opinions are attached hereto as Appendix A.

JURISDICTION.

1. This is an appeal by Plaintiff Paul W. Heisey, a taxpayer, from a split decision of the California Supreme Court reversing a judgment of the Superior Court of Alameda County which declared invalid and restrained the execution of Chapter 242, Section 1, Statutes of California, 1951. The suit was commenced by Plaintiff Alfred J. Lundberg on behalf of himself and all taxpayers similarly situated. It sought a permanent injunction and declaratory relief to restrain the execution of the statute so far as it purported to grant a property tax exemption to non-public, sectarian and denominational schools, operated by private including religious groups. Validity of the statute was challenged on the grounds that it was repugnant to certain

state constitutional provisions, to the establishment of religion clause of the First Amendment, and to the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

2. The California Supreme Court handed down its opinion on June 6, 1956. Appellant's petition for rehearing was denied on July 5, 1956. Notice of Appeal to this Court was filed by appellant with the Clerk of the California Supreme Court on August 3, 1956.

3. The jurisdiction of this Court on appeal is conferred by 28 U.S.C.A. §1257(2). Appellant challenged the validity of the state statute on the grounds of its repugnance to the First and Fourteenth Amendments, and the decision of the highest court of the state was in favor of its validity.

4. Cases which sustain the jurisdiction of this Court on appeal include *Williams v. Bruffy*, 96 U. S. 176, 24 L. Ed. 716; *Illinois ex rel. McCollum v. Board of Education*, 333 U. S. 203, 92 L. Ed. 649; *Everson v. Board of Education*, 330 U. S. 1, 91 L. Ed. 711.

5. The state statute involved may be found in Chapter 242, Section 1, pp. 502-503 of Volume 1, Statutes of California, 1951 and reads as follows:

> "Section 1. Section 214 of the Revenue and Taxation Code is amended to read:
>
> "214. Property used exclusively for religious, hospital, scientific, or charitable purposes owned and operated by community chests, funds, foundations or corporations organized and operated for religious, hospital, scientific, or charitable purposes is exempt from taxation if:

"(1) The owner is not organized or operated for profit;

"(2) No part of the net earnings of the owner inures to the benefit of any private shareholder or individual;

"(3) The property is not used or operated by the owner or by any other person for profit regardless of the purposes to which the profit is devoted;

"(4) The property is not used or operated by the owner or by any other person so as to benefit any officer, trustee, director, shareholder, member, employee, contributor, or bondholder of the owner or operator, or any other person, through the distribution of profits, payment of excessive charges or compensations or the more advantageous pursuit of their business or profession;

"(5) The property is not used by the owner or members thereof for fraternal or lodge purposes, or for social club purposes except where such use is clearly incidental to a primary religious, hospital, scientific, or charitable purpose;

"(6) The property is irrevocably dedicated to religious, charitable, scientific, or hospital purposes and upon the liquidation, dissolution or abandonment of the owner will not inure to the benefit of any private person except a fund, foundation or corporation organized and operated for religious, hospital, scientific, or charitable purposes;

"(7) The property, if used exclusively for scientific purposes, is used by a foundation or institution which, in addition to complying with the foregoing requirements for the exemption of

charitable organizations in general, has been chartered by the Congress of the United States, and whose objects are the encouragement or conduct of scientific investigation, research and discovery for the benefit of the community at large.

"The exemption provided for herein shall be known as the 'welfare exemption.' This exemption shall be in addition to any other exemption now provided by law. This section shall not be construed to enlarge the college exemption. *Property used exclusively for school purposes of less than collegiate grade and owned and operated by religious, hospital or charitable funds, foundations or corporations, which property and funds, foundations or corporations meet all the requirements of this section, shall be deemed to be within the exemption provided for in Section 1c of Article XIII of the Constitution of the State of California and this section.*"

The italicized portion was added by the 1951 amendment and is the portion challenged by this suit.

QUESTIONS PRESENTED.

1. Whether a state statute which grants to religious and certain other private groups complete immunity from property taxation in respect of all their non-public, undercollegiate schools is repugnant to the First Amendment of the United States Constitution as construed in *Illinois ex rel. McCollum v. Board of Education*, 333 U. S. 203, 92 L. Ed. 649; *Everson v. Board of Education*, 330 U. S. 1, 91 L. Ed. 711; and

Zorach v. Clauson, 343 U. S. 306, 96 L. Ed. 954 in that it is a denial to appellant and those similarly situated of freedom from forced public financial support, legal maintenance, or aid of religious activities or institutions, where said statute results in forced public tax support for, and use of the force of the tax system to promote, the private purposes, ecclesiastical activities and institutions of certain religious sects which own and conduct most of such schools, and as a prime and private purpose, teach and instruct therein on sectarian doctrine prohibited in the free tax-supported, public, undercollegiate schools the state has undertaken to provide for all on equal terms.

2. Whether a state statute granting such tax exemption is repugnant to the Fourteenth Amendment of the United States Constitution as construed in *Brown v. Board of Education,* 347 U. S. 483, in that it is a denial of the equal protection or due process clauses to appellant and those similarly situated who are proscribed by law from sectarian indoctrination in said public schools of the state, where said statute results in forced public tax support for, and the use of the force of the tax system to promote, ecclesiastical schools competitive to the public schools, owned and conducted by certain religious sects and that, as a prime and private purpose, teach and instruct therein on such sectarian doctrine forbidden in said public schools.

3. Whether a state statute granting such tax exemption is repugnant to said Fourteenth Amendment, in that it is a denial of the equal protection or

due process clauses to appellant and those similarly situated who are thereby forced to pay additional taxes and thus are deprived of property for a non-public purpose where most of said non-public schools are conducted primarily to advance and teach sectarian and denominational doctrine, forbidden by law as an object of public support in said public schools.

4. Whether a state statute granting such tax exemption is repugnant to the Fourteenth Amendment of the United States Constitution as a denial to appellant and those similarly situated of the equal protection or due process clauses, in that it violates the Constitution of California which provides: "All property in the State except as otherwise in this Constitution provided" * * * "shall be taxed in proportion to its value," and further that "Neither the Legislature, nor any county, city and county, township, school district, or other municipal corporation, shall ever make an appropriation, or pay from any public fund whatever, or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose, or help to support or sustain any school, college, university, hospital, or other institution controlled by any religious creed, church, or sectarian denomination whatever;" and there being no specific exemption provision set forth in said Constitution for said non-public schools.

5. Whether a state statute granting such tax exemption is repugnant to the Fourteenth Amendment of the United States Constitution as a denial to appellant and those similarly situated of the equal pro-

tection or due process clauses in that it is vague, indefinite and uncertain, where said statute was passed pursuant to a provision of the Constitution of California which permits the Legislature to exempt "property used exclusively for religious, hospital or charitable purposes and owned by community chests, funds, foundations or corporations organized and operated for religious, hospital, or charitable purposes," but without inclusion of an educational classification, and without limitation as to the value or amount of property which thus may be removed from the public tax rolls, or as to whether religious indoctrination, or racial, color or creed discrimination, prohibited in said public schools, may be conducted and practiced in said competitive non-public schools.

6. Whether a state statute granting such tax exemption is repugnant to the First and Fourteenth Amendments of the United States Constitution as a denial of the equal protection or due process clauses and as an abridgement of rights and privileges of appellant and those similarly situated to the American form of government, including the separation of church and state guaranteed by the First Amendment, and protection against ruinous competition to said public schools which the State has undertaken to provide for all on equal terms and in which sectarian teaching is prohibited, where said statute results in forced public tax support to advance the private purposes, ecclesiastical activities and institutions of one particular religious sect that by an overwhelming majority owns and conducts most of said non-public

schools and that as a prime and private purpose teaches and instructs therein on its particular sectarian doctrine, its said non-public schools being governed by and teaching the Roman Catholic Papal decrees and canonical laws which are alien and hostile to American concepts of separation of church and state, religious freedom and popular government.

7. Did the Alameda County Superior Court and the California Supreme Court err prejudicially in excluding and refusing to consider and make findings on Plaintiff's Exhibits 5 and 6, comprising textbooks used in said Roman Catholic, non-public, undercollegiate schools, and the testimony on Roman Catholic canonical law, offered in evidence to augment proof and judicial knowledge of the purpose, type and extent of teaching and instruction on sectarian doctrine in such sectarian schools as would be exempt under the statute?

STATEMENT.

This is a taxpayers' action brought to challenge the validity of a 1951 amendment to California Revenue and Taxation Code Section 214, which grants complete immunity from property taxation to non-public, undercollegiate, sectarian schools operated by religious and other private groups. The suit was commenced by Alfred J. Lundberg on behalf of himself and all other citizen, resident, taxpayers of the City of Oakland, County of Alameda and State of California similarly situated.

Under Article XIII, Section 1 of the California Constitution, all property in the state must be taxed unless it is specifically exempted by the State Constitution or by the laws of the United States. In 1944, the people of California adopted a constitutional amendment which added Section 1c to Article XIII and authorized the State Legislature to exempt from taxation property used exclusively for religious, hospital or charitable purposes, owned by community chests, funds, foundations or corporations, and organized and operated for religious, hospital, or charitable purposes. The language of the new constitutional section was taken directly from state and federal revenue law provisions, except that these parent provisions specifically include "educational" purposes along with "religious," "charitable," and other purposes. But, the California Legislature expressly deleted the word "educational" from the proposed language of Section 1c before it was submitted to the voters. And the 1944 Argument to the Voters therefore stated:

> "Churches and colleges already are exempt. Competent legal authority advises that schools other than colleges will not be exempted under this amendment because the Legislature expressly eliminated the term 'educational.'"

Nevertheless, in 1951 the State Legislature added to Section 214 of the Revenue and Taxation Code the following provision which is challenged by this suit:

> "* * * *Property used exclusively for school purposes of less than collegiate grade and owned and*

operated by religious, hospital or charitable funds, foundations or *corporations,* which property and funds, foundations or corporations meet all of the requirements of this section, *shall be deemed to be within the exemption provided for in Section 1c of Article XIII* of the Constitution of the State of California and this section." [Emphasis ours.]

As a result of this 1951 statutory change, over a million and a quarter dollars in tax money will be lost to the public each year through tax exemption, with non-public, sectarian schools receiving the benefit of public services and facilities free of charge, and the remaining taxpayers being forced to foot the bill for the subsidy. Moreover, the tax exemption subsidy overwhelmingly benefits the non-public schools of one sect in particular—the Roman Catholic Church.

In California, the newly exempted Roman Catholic parochial schools are owned almost exclusively by five welfare corporations which, in turn, are controlled by the five Roman Catholic Archdioceses of the state. One of these corporations—the Roman Catholic Welfare Corporation of San Francisco—intervened in this suit. There were produced as witnesses the respective school superintendents for these five Archdioceses of California. At the trial, counsel for the intervenor prepared the following summary of their testimony as to the number of schools which had applied for exemption, the number of students in attendance thereat, the types of church schools, and the total taxes paid in the year 1952-1953 prior to application for exemption:

"1. Total number of schools throughout the State of California which have applied for exemption: 708, of which 473 are Catholic and 235 are not Catholic.

"2. Total number of students being educated in all schools, in California which have applied for exemption: 232,083, of which 206,023 attend Catholic schools and 26,060 attend other schools.

"3. Total amount of taxes paid in fiscal year 1952-1953 in respect of all schools in California which have applied for exemption: $1,123,882.99, of which the amount paid in respect of Catholic schools was $900,763.11, and the amount paid in respect of other schools was $223,119.88."

This evidence thus indicates that over 88% of the tax exemption subsidy goes to Roman Catholic schools in terms of pupils benefited thereby and over 80% to such Roman schools in terms of tax dollars released.

The exempt Roman schools primarily teach religion. Pupils are given daily instruction devoted solely to the doctrines of the Roman Church. In addition, courses are taught daily in religious subjects which the superintendents claimed might be acceptable to all faiths. In addition, and as the textbooks used in these Roman Schools indicate, the Roman Catholic philosophy and religion "is infused into the whole process of learning." (See V *The Catholic Encyclopedia* (1925) p. 304, XIII *The Catholic Encyclopedia* 555, Appendix E of this Jurisdictional Statement.)

Under questioning by plaintiff's counsel, the Roman Catholic School Superintendents identified a number of textbooks—Plaintiff's Exhibits 5 and 6—as being

in use generally throughout California. Plaintiff several times offered these testbooks in evidence, but the trial court declined to admit them, sustaining the Intervenor Roman Catholic Welfare Corporation's objection that the books were incompetent, irrelevant, and immaterial.

Plaintiff offered these textbooks for a fourfold purpose:

1. To prove the purpose and extent of the Roman Catholic sectarian indoctrination in the schools to be exempted. This includes the purpose of the Roman Catholic Church to obtain a monopoly on education for its own aims.

2. To prove that all the school subjects taught are infused and slanted toward the Roman Catholic doctrine and dogma.

3. To prove the extremely inflammatory and divisive nature of the Roman Catholic sectarianism so indoctrinated.

4. To refute the testimony of the Roman Catholic school superintendents to the effect that religious indoctrination takes up only a small portion of the school day and that a portion of this is devoted to principles acceptable to all faiths.

Plaintiff Lundberg and those similarly situated challenged the validity of the 1951 statute under both the State and the Federal Constitutions.

In the original complaint, plaintiff alleged with particularity that the 1951 amendment violated the First and Fourteenth Amendments of the Constitution of the United States [Paragraphs VIII (b), VIII (c),

and VIII (d)]. Similarly, in the Amended Complaint which framed the issues for trial, plaintiff alleged in Paragraph VIII (b) that the 1951 statute violated the First Amendment to the Constitution of the United States, made applicable to the States by the Fourteenth Amendment thereof, in that it was a law respecting an establishment of religion and granted preference to, aided and subsidized parochial or church schools conducted not merely for educational purposes but also for the purpose of indoctrinating children in the particular dogma of the religious sect which conducted the schools. In Paragraph VIII (c), plaintiff alleged with particularity that the statute violated the Fourteenth Amendment of the Constitution of the United States in that it denied to plaintiff the equal protection of the laws and was class legislation. Similarly, in Paragraph VIII (d), plaintiff alleged with particularity that the statute violated the Fourteenth Amendment of the Constitution of the United States in that it was arbitrary.

Plaintiff's insistence that the statute was repugnant to the First and Fourteenth Amendments was apparent also from the evidence offered and adduced at the trial of the action. Thus plaintiff produced evidence as to the religious activities and purposes of the schools that would receive the benefit of the tax exemption subsidy. And plaintiff sought to adduce even further evidence as to the nature of the subject matter taught in the religious schools.

The case was tried before three judges of the Alameda County Superior Court. A majority of the trial

court found that the 1951 statute violated the California Constitution. They then, and for that reason, declined to rule on the Federal questions (Par. 15, Findings of Fact; Par. 1, Conclusions of Law). Judgment was entered in favor of plaintiff and those similarly situated declaring that the 1951 statute violated Article XIII, Section 1 of the California Constitution, and therefore, was null, void, and of no force and effect. The defendant city and county officials were accordingly enjoined and restrained from carrying the law into effect and from receiving and approving claims for exemption. Copies of the Findings of Fact, Conclusions of Law, and Judgment of the trial court are attached hereto as Appendix B.

Dissenting Findings of Fact and Conclusions of Law were rendered by the third judge, and are attached hereto as Appendix C. In Paragraph 7 of these Dissenting Findings of Fact, the third judge expressly declared that all of the allegations of Paragraph VIII of the Amended Complaint were untrue and in particular that "said Amendment of 1951 does not violate the 1st Amendment to the Constitution of the United States," and "said Amendment of 1951 does not violate the 14th Amendment to the Constitution of the United States." Similarly, the dissenting judge concluded in Paragraph 1 of the Conclusions of Law that the statute "is not invalid or unconstitutional in any respect."

Both the defendant City and County officials and the intervenor Roman Catholic Welfare corporation appealed to the California Supreme Court from the

judgment of the trial court. In the proceedings before the California Supreme Court, plaintiff Lundberg continued to raise the Federal questions in his briefs and in the oral arguments. Thus at pages 93 to 144 of his Respondent's Consolidated Reply Brief, plaintiff in seeking affirmance of the judgment of the trial court did so upon the ground among others that the 1951 statute was repugnant to the First and Fourteenth Amendments. Acting pursuant to Article VI, Section 4¾ of the California Constitution, Section 956 (a) of the California Code of Civil Procedure, and Rule 23, Rules on Appeal (36 C. 2d 1, 20), plaintiff specifically asked the California Supreme Court to make findings on the Federal questions. Plaintiff again raised the First and Fourteenth Amendment issues, (1) at pages 32-36 of his Opening Brief in a subsidiary appeal, (2) at pages 71-80 of his Reply to Brief Filed Amici Curiae, and (3) at pages 7-8 and 18-19 of his Supplemental Reply Brief.

The Federal question respecting the "establishment of religion" clause was thus adequately and properly raised and this was recognized by the California Supreme Court in its opinion (See Appendix A). The United States Supreme Court has held in *Charleston Federal Savings & Loan v. Alderson*, 324 U. S. 182, 89 L.Ed. 857 that it will accept such recognition by the state supreme court that the Federal question was properly raised in that court.

Plaintiff likewise properly raised the remainder of the Federal questions respecting the Fourteenth Amendment. Thus he repeatedly urged the Fourteenth

Amendment objections in the trial court and in his appellate briefs. In the face of these objections, the State Supreme Court reversed the judgment of the trial court and sustained the validity of the state statute. The additional Federal issues were thus preserved even if they had not specifically been mentioned in the opinion of the state court. See *Largent v. Texas*, 318 U. S. 418, 87 L. Ed. 873.

Plaintiff again raised the federal questions at pages 27-45 of his Petition for Rehearing, specifically asking that the California Supreme Court reconsider and discuss *all* Federal issues.

The decision of the California Supreme Court was rendered on June 6, 1956.

On June 14, 1956, plaintiff Alfred J. Lundberg died.

Appellant Paul W. Heisey is a citizen, resident taxpayer of the City of Oakland, County of Alameda, State of California, and as such is one of the persons for whom the class suit was originally brought. In fact, under California law, he was at all times a *quasi* party to the action.

Immediately following the death of Mr. Lundberg, and in order to protect the interest of himself and other taxpayers in the appellate and other proceedings, appellant moved the Alameda County Superior Court for an order bringing him in and making him an actual party to this action and permitting him to prosecute the same to a final conclusion as an additional taxpayer plaintiff herein. The Alameda County Superior Court made such an order on June 19, 1956.

Following this, appellant filed a petition in the California Supreme Court for an order bringing him in individually and making him a party to this action on appeal. On June 27, 1956, the California Supreme Court granted his request and ordered that he be added as an additional plaintiff-respondent in the appeal proceedings. A copy of the California Supreme Court order is attached hereto as Appendix D. Appellant Paul W. Heisey therefore, continues these proceedings and prosecutes this appeal on behalf of himself and all the taxpayers situated similarly to himself and the deceased plaintiff Lundberg.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL.

I. THE CALIFORNIA STATUTE CONTRAVENES THE ESTABLISHMENT OF RELIGION CLAUSE OF THE FIRST AMENDMENT BY FORCING PUBLIC TAX SUPPORT FOR, AND USING THE FORCE OF THE TAX SYSTEM TO PROMOTE NON-PUBLIC, UNDERCOLLEGIATE, SECTARIAN SCHOOLS, COMPETITIVE TO THE PUBLIC SCHOOLS, AND INDOCTRINATING RELIGIOUS DOGMA PROHIBITED IN THE PUBLIC SCHOOLS.

The California Supreme Court has upheld the validity of a state statute which compels public subsidies through tax exemption for non-public, undercollegiate, sectarian schools in amounts exceeding a million dollars a year. The result is forced public tax support for, and the use of the force of the tax system to promote sectarian education. Appellant and taxpayers similarly situated will be compelled to bear a substantial, added tax burden to support non-public schools undertaking the very sectarian indoctrination which is

banned by the Federal and State Constitutions in tax-supported, public, undercollegiate schools. Appellant and other taxpayers must assume this added tax burden under the statute while the subsidized sectarian schools would enjoy immunity from property taxes but receive all the benefits of public services and public facilities free of charge.

Whether such a statute violates the principles of separation of church and state embodied in our Federal Constitution is certainly a substantial question and one deserving plenary consideration, with briefs on the merits and oral argument for its resolution.

In the famous "Virginia Bill for Religious Liberty" originally written by Thomas Jefferson, it is said:

> "That to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor, whose morals he would make his pattern."

And the statute enacted:

> "That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever."

The guiding principles of separation of church and state have, of course, been bolted and riveted down into the First Amendment of our Federal Constitution and made applicable to our states by the landmark cases of *Everson v. Board of Education,* 330 U. S. 1, 91

L. Ed. 711, and *Illinois ex rel. McCollum v. Board of Education,* 333 U. S. 203, 92 L. Ed. 649. The limitation which these principles place on our state legislatures has been stated as follows in both the *Everson* and *McCollum* cases:

> "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. NEITHER CAN PASS LAWS WHICH AID ONE RELIGION, AID ALL RELIGIONS, OR PREFER ONE RELIGION OVER ANOTHER.
>
> * * * * *
>
> "NO TAX IN ANY AMOUNT, LARGE OR SMALL, CAN BE LEVIED TO SUPPORT ANY RELIGIOUS ACTIVITIES OR INSTITUTIONS, WHATEVER THEY MAY BE CALLED, OR WHATEVER FORM THEY MAY ADOPT TO TEACH OR PRACTICE RELIGION." [Emphasis ours.]

Moreover, in *Zorach v. Clauson,* 343 U. S. 306, 96 L. Ed. 954, this Court states, "We follow the *McCollum* case" (343 U. S. 315), adding that "GOVERNMENT MAY NOT FINANCE RELIGIOUS GROUPS . . . NOR USE SECULAR INSTITUTIONS TO FORCE ONE OR SOME RELIGION ON ANY PERSON" (343 U. S. 314).

In the *McCollum* case, the United States Supreme Court almost unanimously rejected a program which made public school classrooms available for religious instruction. As this Court later observed in *Zorach v. Clauson* at 343 U. S. 315, it was the fact that "THE

FORCE OF THE PUBLIC SCHOOL WAS USED TO PROMOTE THAT [RELIGIOUS] INSTRUCTION" which made the program repugnant to the First Amendment.

It is therefore clear that the First Amendment means:

1. That our people may not be forced to support or promote the indoctrination of sectarian ideas and beliefs *in non-public schools;*

2. That state laws which aid or promote religious indoctrination *in non-public schools* will be found repugnant to the First Amendment;

3. That state laws which, in the field of *non-public versus public schools,* render *financial aid or grant tax subsidies* to non-public sectarian institutions *are particularly obnoxious* to the principles embodied in the First Amendment; and

4. That the use of the force of a state institution—whether it be the public school system or the public tax system—to aid, promote, or support sectarian education *in non-public schools* is a clear violation of the First Amendment.

Guided by these fundamental principles of religious liberty, the conclusion is inescapable that the California tax exemption statute is repugnant to the United States Constitution.

Tax exemption is both an aid and a subsidy. See *Hunter, Tax Exemption—A Subsidy,* 8 Tax. Magazine 332, 351; *Stimson, The Exemption of Property From Taxation in the U. S.,* 18 Minn. L. Rev. 411, 419;

Baker, Tax Exemption Statutes, 7 Tex. L. Rev. 50; *Note, Catholic Schools and Public Money,* 50 Yale L. J. 917, 922; *Note, Constitutionality of Tax Benefits Accorded Religion,* 49 Col. L. Rev. 968, 985.

As pointed out in *Commonwealth v. Thomas,* 119 Ky. 208, 83 S. W. 572, 573:

> "It does not require profound reflection to reach the conclusion that whatever deficit there is in the fiscal budget due the state for any given year by reason of exemptions of property which would otherwise be required to contribute to the common weal is cast as an additional burden upon the other taxpayers; and it results, therefore, that every exemption is indirectly an additional tax upon the property owners not enjoying a like benefaction. It would follow, therefore, that an exemption in favor of property devoted to the advancement of any particular religious belief is indirectly, at least, a tax upon all the other property owners of the commonwealth to support that belief."

See also *Orr v. Baker,* 4 Ind. 86, 88 and *People ex rel. Auditor v. Illinois Cent. R. Co.,* 119 Ill. 83, 87, 6 N. E. 469, 471.

Following the decisions in the *Everson* and *McCollum* cases, almost every legal writer discussing this problem has pointed out that such tax exemptions violate the Federal Constitution. *Pfeffer, "Church, State and Freedom",* 183-190 (1953); *Note, "Constitutionality of Tax Benefits Accorded Religion,"* 49 Col. L. Rev. 968, 985; *Paulsen, "Preferment of Religious Institutions in Tax and Labor Legislation,"* 14 Law

and Contemp. Prob. 144; *Note, Establishment of Religion by State Aid,* 3 Rutgers L. Rev. 115, 121-123; *Note,* 45 Mich. L. Rev. 1001, 1019-1020; *Note,* 61 Yale L. J. 403, 406-407; *Note, "Establishment of Religion Clause Applied to the States,"* 33 Cornell L. Q. 122, 128.

The opinion of the 4 judge majority of the California Supreme Court has failed to recognize these points. At 46 A.C. 657, the majority of the Court asserts two answers to Appellant's contention that the 1951 statute contravenes the establishment of religion clause of the First Amendment:

First, that the exemption was enacted to promote the general welfare through encouraging education of the young and not to favor religion. Under the circumstances, they say, the benefit received by religious denominations is merely incidental to the achievement of a *public purpose. Everson v. Board of Education,* 330 U. S. 1, is then urged as an analogous precedent by reason of its holding that a program for safe transportation of pupils is a public program.

Second, that even if the statute does benefit religious organizations, it implements a program which began in the Colonial period, is widely followed, and which has been upheld by two state court decisions.

These two "answers" miss the point of the aims and objectives of sectarian, non-public schools, of what is taught in those schools, and of the compelling reasons for church-state separation so carefully spelled out in the three recent decisions of the United States Supreme Court.

In the first place, *sectarian education in non-public schools is not a public purpose.* Instead, it is divisive and competitive to the public schools in which such teaching is barred by law. The Supreme Court rejected the program of sectarian education proposed in the *McCollum* case. Under our federal Constitution, enforced public support of sectarian and religious education are and must always remain matters of private —not public—concern. As Justice Schauer states in his dissenting opinion in *Roman Catholic Welfare Corporation v. City of Piedmont,* 45 C. 2d 325, 335, 289 P.2d 438, 444:

> "It is elementary that the conduct of a public school is a public service while the operation of a private school is *a private business.*"

Moreover this thinking is set forth in Section 8 of Article IX of the California Constitution which expressly provides:

> "No public money shall ever be appropriated for the support of any sectarian or denominational school, or any school not under the exclusive control of the officers of the public schools; nor shall any sectarian or denominational doctrine be taught, or instruction thereon be permitted, directly or indirectly, in any of the common schools of this State."

To say that sectarian schools which openly and avowedly indoctrinate sectarian dogma *and infuse it into the entire learning process* are performing a *public* purpose is to deny the most fundamental premise of the First Amendment—that *religious dogma and*

belief are matters solely for individual choice, not political dictation.

In the second place, a million dollar annual tax exemption is a direct, ever increasing and devoutly sought after subsidy—not a mere "incidental" benefit. In the valuable note entitled *Catholic Schools and Public Money*, 50 Yale L. J. 917, the writer points to the various legal fictions and devices which sectarian schools have used to sustain themselves at the expense of taxpayers. But in the field of tax exemption, there can be no quibbling with a fiction that the children, not the schools, receive the benefit. Religious groups owning or operating sectarian schools—not pupils—are granted the tax exemption. They—not the pupils—would otherwise pay the taxes. Sectarian schools—not pupils—apply for tax exemptions. Sectarian schools—not pupils—spend the released tax money for sectarian educational purposes. And sectarian schools—not the pupils—receive the free public services such as fire, police, sanitation and other protection. To say that a tax exemption for church schools is not an aid to religion is to say that one may erect a church with *public funds* and not violate the Federal Constitution because only the parishioners are substantially benefited thereby.

In the third place, *Everson v. Board of Education*, 330 U. S. 1, is not a truly analogous case. There a split court even held that even the furnishing of transportation to parochial school children "approaches the verge of that [the State Constitutional] power." It was justified merely as a *public safety* measure. No

such alternative purpose exists here. Sectarian schools, controlled by sectarian institutions which are granted the tax exemption, indoctrinate sectarian dogma forbidden in the public schools and are the direct beneficiaries of the tax immunity. *Education* in the sense of public school education is a public purpose, but *sectarian education* is not. Sectarian education is a forbidden object of public support.

In the fourth place, to say that sectarian school tax exemptions arose in the Colonial period is not to justify their existence, forever after, but rather to confess doubt of present validity. For the first of such state tax exemptions arose out of the then unity which in the pre Constitution Colonies existed between church and state. See *The Franklin Street Society v. Manchester,* 60 N. H. 342. The reason for such exemptions vanished with the adoption of our American concepts of separation of church and state and the origin, purpose and development of public schools. See *Stimson, The Exemption of Property from Taxation in the United States,* 18 Minn. L. Rev. 411, 416-419. The exemptions may have originated in our early history, and some as outmoded relics may have survived today, but the reasons for, and not the fact of survival are the important thing.

To begin with, public aid through tax exemption is an easily concealed mode of conferring public favors. It is often resorted to for the very purpose of keeping unobserved the extent of the public donation. *Brainard v. Town of Colchester,* 31 Conn. 407, 410. Furthermore, and perhaps for these reasons, such exemptions

seldom have been challenged under state constitutions. *Zollman, Tax Exemptions of American Church Property,* 14 Mich. L. Rev. 646, 652-653. Also, the courts which have dealt with the problem have failed to recognize or discuss that parochial school exemptions arose in a period when parochial schools were performing a state function by reason of the Colonial church-state unity. And, the clearcut precedent for a challenge under the *Federal* Constitution is so recent that this very case is the first tax exemption case to reach the court following the historic *Everson* and *McCollum* decisions.

Finally, the two cases relied upon by the California Supreme Court provide no well-reasoned authority for its position. Both were decided long before the *Everson* and *McCollum cases.* And both involved *state* constitutional provisions.

In *Trustees of Griswold College v. State of Iowa,* 46 Iowa 275, 26 Am. Rep. 138 (1877), the Iowa court held in a 3-2 decision that a *church* exemption statute did not violate the *state* "establishment of religion clause." But the court gave no reason for its decision and was not presented with a case involving undercollegiate sectarian *schools,* which directly compete with the non-sectarian public schools the state has undertaken to provide for all on free and equal terms.

In *Garrett Biblical Institute v. Elmhurst State Bank,* 331 Ill. 308, 163 N. E. 1 (1928) the question again arose under a *state* constitutional provision, again *did not involve* a competitive parochial *school,* and again arose before the *Everson* and *McCollum*

decisions. The Illinois court based its decision on the fact that no "preference" was shown any *particular* denomination by the exemption provisions and asserted that the tax exemption was not a cost or burden to taxpayers. But as Stimson points out in 18 Minn. L. Rev. 411, 419:

> "An examination of court opinions discloses the fact that legislation granting indirect subsidies, in the form of tax exemption, is upheld by the courts, even though a direct subsidy to the same institutions would be denied under the doctrine of direct public purpose. This is amply illustrated in the case of churches, sectarian schools, and private industrial enterprises. Tax exemption for paupers or war veterans, on the other hand, is not inconsistent with the public purpose doctrine, since direct aid may be extended to such persons. Courts quite generally have failed to see that tax exemption is a subsidy whose burden rests upon taxpayers."

Thus, the need for a plenary consideration of this case is manifest from a failure of the 4-3 majority decision of the California Supreme Court to see the obnoxious and tyrannical burden which the California parochial school exemption subsidy places upon appellant and other taxpayers similarly situated. In California, appellant and those similarly situated must now as public taxpayers directly subsidize schools that compete with the common schools of the state. Moreover, such non-public schools thus would teach and at public expense matters not allowed in the public schools. Also, the subsidy goes overwhelmingly to the schools operated and controlled by one sect, the Roman

Catholic Church. And that church seeks a monopoly on education for its own purposes, and teaches in its sectarian schools that separation of church and state is merely a "practical necessity of evil times," and that attendance at American Public Schools by Roman Catholic children is forbidden and will only be "tolerated" under exceptional circumstances under instructions imported from Rome, and subject to inspection by officials of the Roman Church. See *Everson v. Board of Education,* 330 U. S. 1, 22; representative quotations from *Living Our Faith,* in Appendix E; XIV *The Catholic Encyclopedia,* p. 253; "Encyclical Letter, Pius XI, December 31, 1929, on Christian Education of Youth," *Four Great Encyclicals* (Paulist Press), page 63*; Bouscaren and Ellis, *Canon Law* (1951), pp. 761-767; II Woywood, *A Practical Commentary On The Code of Canon Law* (1925), pp. 117-120.

---

*Pope Pius XI is quoted as follows:

"From this it follows that the so-called 'neutral' or 'lay' school, from which religion is excluded, is contrary to the fundamental principles of education. Such a school moreover cannot exist in practice; it is bound to become irreligious. There is no need to repeat what our Predecessors have declared on this point, especially Pius IX and Leo XIII, at times when laicism was beginning in a special manner to infest the public school.

We renew and confirm their declarations as well as the Sacred Canons in which the frequenting of non-Catholic schools, whether neutral or mixed, those namely which are open to Catholics and non-Catholics alike, is forbidden for Catholic children, and can be at most tolerated, on the approval of the Ordinary alone, under determined circumstances of place and time, and with special precautions. Neither can Catholics admit that other types of mixed schools (least of all the so-called 'ecole unique', obligatory on all), in which the students are provided with separate religious instruction but receive other lessons in common with non-Catholic pupils from non-Catholic teachers."

Appellant and those similarly situated are, therefore, forced to bear an additional burden of taxes so that over $1,000,000 annually may go directly to foster and propagate a competitive school system which indoctrinates religious dogma that appellant and such taxpayers disbelieve and teaches concepts alien and hostile to popular government, public schools, and even freedom of thought and expression and religion. That cannot, and should not, be allowed if we are to stay American.

II. THE STATUTE CONTRAVENES THE EQUAL PROTECTION OR DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT BY FORCING APPELLANT AND OTHER TAXPAYERS WHO ARE PROSCRIBED FROM SECTARIAN INDOCTRINATION IN THE PUBLIC SCHOOLS TO SUPPORT NON-PUBLIC SCHOOLS WHICH COMPETE WITH THE PUBLIC SCHOOLS AND INSTRUCT ON THE VERY SECTARIAN SUBJECTS FORBIDDEN IN THE PUBLIC SCHOOLS.

Section 8, Article IX, of the California Constitution provides in part as follows:

> "* * * nor shall any sectarian or denominational doctrine be taught, or instruction thereon be permitted, directly or indirectly, in any of the common schools of this State."

Section 8273 of the California Education Code provides in part as follows:

> "No publication of a sectarian, partisan, or denominational character, shall be used or distributed in any school, or be made a part of any school library, nor shall any sectarian or denominational doctrine be taught in any school."

Appellant and other taxpayers similarly situated are therefore proscribed, not only by the Federal Constitution, but also by the express provisions of the state constitution and state laws from having their religious beliefs propagated or indoctrinated in the public schools. Yet appellant and such taxpayers are compelled to bear an added tax burden and to see the force of the tax system used to promote sectarian instruction in competitive, non-public schools that as a prime and private purpose teach and instruct the very sectarian doctrine forbidden in the public schools.

In *Brown v. Board of Education*, 347 U. S. 483, this Court bespoke the importance of the free, equal, non-sectarian public school system of today. It said:

> "Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. * * * *Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.*" (Emphasis added.)

It is the express and fundamental holding of the *Brown* case that publicly supported education must be made available to all on equal terms.

The state may not establish or support schools which segregate along lines of race, color, or religion. Publicly supported education must be free from unequal treatment, from sectarian influence and from enforced religious indoctrination.

Appellant contends that it would be a violation of the Fourteenth Amendment to forbid racial segregation or religious indoctrination in the state supported common schools and yet at the same time permit the state to evade these mighty constitutional prohibitions by compelling tax support for, or using the force of the tax system to promote schools which engage in the very practices prohibited in the common school system. To endorse such a practice would violate the basic inhibition of *Brown v. Board of Education*, 347 U. S. 483. Publicly supported education must be made available to all on equal terms. There should be no circumvention through a tax-supported private school system.

The 1951 Amendment to the California Revenue and Taxation Code Section 214 is such a law.

Appellant and those similarly situated are proscribed from having their religious views indoctrinated in the public schools. They may not seek or compel public support for the indoctrination of their religious views, or any religious views, in the public schools. Yet they are forced to support, and the force of the tax system is used to promote schools whose primary purpose is the indoctrination of religious dogma which appellant and those similarly situated disbelieve.

This statute therefore fails to make publicly supported education available to all on equal terms. It is an opprobrious discrimination against appellant and those similarly situated—and all the more so because the non-public schools receiving most of the benefit not only seek a monopoly on education and indoctrinate religious dogma, but also compete with and teach hos-

tility to the common school system which the state provides and supports as a cornerstone of American democracy.

III. THE STATUTE CONTRAVENES THE DUE PROCESS CLAUSE BY FORCING APPELLANT AND THOSE SIMILARLY SITUATED TO PAY ADDITIONAL TAXES AND THUS BE DEPRIVED OF PROPERTY FOR A NON-PUBLIC PURPOSE. THE BENEFITED NON-PUBLIC SCHOOLS ARE CONDUCTED PRIMARILY TO ADVANCE SECTARIAN DOCTRINE WHICH IS NOT A PUBLIC PURPOSE BUT ACTUALLY FORBIDDEN BY LAW AS AN OBJECT OF PUBLIC SCHOOL SUPPORT.

It is elementary that the conduct of a public school is a public service while the operation of a private school is a private business. See Schauer, J., *Roman Catholic Welfare Corporation v. City of Piedmont,* 45 C. 2d 325, 335, 289 P. 2d 438, 444.

The Constitution of California provides in Article IX for public schools (see also Article XIII, Section 15) and in Section 15 of Article XVI declares among other things:

> "* * * that it is in the interests of the State and of the people thereof for the State to aid school districts of the State in providing necessary and adequate school sites and buildings for the pupils of the Public School System, such system being a matter of general concern inasmuch as the *education of the children of the State is an obligation and function of the State.*" (Emphasis added)

No such public interest, obligation, or purpose is present where private, sectarian, undercollegiate schools are concerned. Section 8, Article IX of the

California Constitution expressly forbids the appropriation of any public money "for the support of any sectarian or denominational school, or any school not under the exclusive control of the officers of the public schools." Section 30, Article IV, goes further. It forbids the state legislature, counties, cities, school districts, and any type of municipal corporation from making appropriations, paying public funds, or granting anything to or in aid of any school controlled by a religious creed, church, or sectarian denomination.

The division between public education and sectarian education is therefore clear in California. The former is a public purpose—a matter of public interest—a willingly accepted *obligation* of the state. The latter is a forbidden object of either public aid or public support.

Under the Fourteenth Amendment to the United States Constitution, it has long been held a violation of the "due process" clause to take or tax one man's property and give it to or thereby benefit another for a *non-public purpose. Thompson v. Consolidated Gas Utilities Corp.,* 300 U. S. 55, 57 S. Ct. 364, 81 L. Ed. 510; *Citizens Sav. & L. Assn. v. Topeka,* 20 Wall. 655, 22 L. Ed. 455.

Thus in *Citizens Savings and Loan v. Topeka,* 20 Wall. 655, 22 L. Ed. 455, bonds of the City of Topeka were issued to a private company "to aid and encourage that company in establishing and operating bridge shops." In holding such bonds illegal, the United States Supreme Court specifically recognized that a preponderance of state court authority had upheld

such uses of public moneys to aid manufacturing enterprises. The Court nevertheless said at 87 L. Ed. 461:

> *"Of all the powers conferred upon government that of taxation is most liable to abuse.*
>
> * * * * *
>
> "The power to tax is, therefore, the strongest, the most pervading of all the powers of government, reaching directly or indirectly to all classes of the people."
>
> * * * * *
>
> "This power can as readily be employed against one class of individuals and in favor of another, so as to ruin the one class and give unlimited wealth and prosperity to the other, if there is no implied limitation of the uses for which the power may be exercised.
>
> "To lay, with one hand, the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms.
>
> "Nor is it taxation. 'A tax,' says Webster's Dictionary, 'is a rate or sum of money assessed on the person or property of a citizen by government for the use of the nation or State.' 'Taxes are burdens or charges imposed by the Legislature upon persons or property to raise money for *public purposes.*' Cooley, Const. Lim., 479.
>
> "Coulter, J., in *Northern Liberties v. St. John's Church,* 13 Pa. St., 104, says, very forcibly, 'I

think the common mind has everywhere taken in the understanding that taxes are a public imposition, levied by authority of the government for the purpose of carrying on the government in all its machinery and operations—that they are imposed for a *public purpose.'*

* * * * *

"But in the case before us, in which the towns are authorized to contribute aid by way of taxation to any class of manufacturers, there is no difficulty in holding that this is not such a *public purpose* as we have been considering. If it be said that a benefit results to the local public of a town by establishing manufactures, the same may be said of any other business or pursuit which employs capital or labor. The merchant, the mechanic, the inn-keeper, the banker, the builder, the steamboat owner are equally promoters of the public good, and equally deserving the aid of the citizens by forced contributions." (Emphasis added)

In our case the enforced public support for a private purpose is directed toward a private, undercollegiate educational system. The system directly competes with the Public School System the state is vigorously supporting and expanding. And this private, competitive system exists primarily to advance sectarian ideas and sectarian purposes.

The power of the tax system is therefore not only employed in favor of one particular class— but a class that is hostile and competitive to the very cornerstone of our democratic processes, the Public School. And it

favors a class that seeks a monopoly on education and teaches and indoctrinates on sectarian dogma forbidden to be taught in the Public School.

Appellant therefore urges that a law which compels taxpayers, through a state tax exemption statute, to aid, support and foster such non-public education is a law repugnant to the due process clause of the Fourteenth Amendment.

IV. THE STATUTE CONTRAVENES THE FOURTEENTH AMENDMENT ON OTHER GROUNDS.

The 1951 California statute grants a tax exemption subsidy to sectarian schools without any specific constitutional authority therefor. This, despite the fact that the California Constitution clearly states that the Legislature may grant no tax exemption without specific constitutional authority (Art. XIII, Sec. 1). This also despite the fact that the California Constitution clearly prohibits the Legislature from granting anything to or in aid of a sectarian purpose, or helping to support, or sustaining any sectarian school. There being no specific tax exemption authority set forth in the California Constitution, appellant contends that it is a deprivation of due process for the State Legislature to grant a tax exemption subsidy in the face of specific Constitutional prohibition against such acts.

Moreover, appellant contends that it is a violation of the due process clause of the Fourteenth Amendment for the Legislature to authorize such a tax

exemption subsidy without any limits as to the value or amount of property which thus may be removed from the public tax rolls, or as to whether religious indoctrination, or racial, color or creed discriminations prohibited in the public schools may be conducted and practiced in said competitive, non-public schools. In short, appellant believes that said statute is constitutionally defective by reason of being vague, indefinite, and uncertain.

Finally, appellant contends that the statute is repugnant to the First and Fourteenth Amendments of the United States Constitution as a denial of the equal protection or due process clauses and as an abridgement of rights and privileges of appellant and those similarly situated to the American form of government, including the separation of church and state guaranteed by the First Amendment, and protection against ruinous competition to said public schools which the State has undertaken to provide for all on equal terms and in which sectarian teaching is prohibited, where said statute results in forced public tax support to advance the private purposes, ecclesiastical activities and institutions of one particular religious sect that by an overwhelming majority owns and conducts most of said non-public schools and that as a prime and private purpose seeks a monopoly on education and teaches and instructs therein on its particular sectarian doctrine, its said non-public schools being governed by and teaching the Roman Catholic Papal decrees and canonical laws which are alien and hostile to American concepts of separation

of church and state, religious freedom and popular government.*

Legal support for our contentions above is set forth under other headings herein.

V. BOTH THE ALAMEDA COUNTY SUPERIOR COURT AND THE CALIFORNIA SUPREME COURT ERRED PREJUDICIALLY IN EXCLUDING AND REFUSING TO CONSIDER AND MAKE FINDINGS ON PLAINTIFF'S EXHIBITS 5 AND 6, COMPRISING TEXTBOOKS USED IN SAID ROMAN CATHOLIC, NONPUBLIC, UNDERCOLLEGIATE SCHOOLS, AND THE TESTIMONY ON ROMAN CATHOLIC CANONICAL LAW, OFFERED IN EVIDENCE TO AUGMENT PROOF AND JUDICIAL KNOWLEDGE OF THE PURPOSE, TYPE AND EXTENT OF TEACHING AND INSTRUCTION ON SECTARIAN DOCTRINE IN SUCH SECTARIAN SCHOOLS AS WOULD BE EXEMPT UNDER THE STATUTE.

In *Everson v. Board of Education,* 330 U. S. 1, 22, Mr. Justice Jackson commented:

> "The function of the Church School is a subject on which this record is meager. It shows only

---

*In Ryan and Boland, *Catholic Principles of Politics* (1952), p. 320, there appears the following quotation demonstrating the hostile and monopolistic aims of Catholic education:

> "Suppose that the constitutional obstacle to proscription of non-Catholics has been legitimately removed and they themselves have become numerically insignificant: what then would be the proper course of action for a *Catholic State?* Apparently, the latter State could logically tolerate only such religious activities as were confined to the members of the dissenting group. *It could not* permit them to carry on general propaganda nor *accord their organization certain privileges that had formerly been extended to all religious corporations, for example, exemption from taxation.*"

This book was published under the imprimatur of Cardinal Spellman and is the basic text for Catholic colleges and seminaries. It is published under copyright of the National Catholic Welfare Conference.

> that the schools are under superintendence of a priest and that 'religion is taught as a part of the curriculum.' "

Appellant presents no such scanty record in this case.

Thus, the Roman Catholic School superintendents of the schools principally benefiting under the 1951 statute were questioned at length as to the time devoted to religious subjects in the school curricula and as to the nature of the subject matter taught. Appellant believes that the nature of the divisive subject matter taught in such schools is relevant. It is relevant to prove the monopolistic educational designs of the Roman Catholic Church. It is relevant to refute the contention that the public receives some *quid pro quo* in respect of the job done by parochial schools and to refute the contention that these schools represent an alternative way of educating our children consistent with the public school way. It is relevant to show the unjust nature of the burden imposed upon non-exempt taxpayers when they are forced to subsidize—by means of tax exemption—institutions indoctrinating such divisive sectarian matter

In addition, and for said purposes, plaintiff laid the foundation for and offered evidence respecting Canonical laws applicable to exempt Catholic schools and the textbooks used in such schools. The trial court refused to admit the evidence and the textbooks. Plaintiff therefore also offered the evidence and textbooks on the appeal and requested the California Supreme

Court to make findings thereon. This was authorized under Rule 23 of the California Supreme Court Rules on Appeal (36 C. 2d 1, 20). The request and offer were ignored in the decision of the California Supreme Court. As pointed out in our Statement of the Case, the textbooks were offered for a four-fold purpose:

1. To prove the extent of the Roman Catholic sectarian indoctrination in the schools to be exempted. This includes the Roman Catholic monopolistic intentions on education.

2. To prove that all the school subjects taught are infused and slanted toward the Roman Catholic doctrine and dogma.

3. To prove the extremely inflammatory and divisive nature of the Roman Catholic sectarianism so indoctrinated.

4. To refute the testimony of the Roman Catholic school superintendents to the effect that religious indoctrination takes up only a small portion of the school day and that 50% of this religious indoctrination is devoted to principles acceptable to all faiths.

Representative quotes from Plaintiff's Exhibit 6 are set forth in Appendix E hereto.

Plaintiff urges that the trial court and the California Supreme Court erred prejudicially in excluding this evidence.

CONCLUSION.

For the reasons stated above, appellant, PAUL W. HEISEY, respectfully submits that the United States Supreme Court has jurisdiction of this appeal and that there are a number of Federal questions so substantial as to require plenary consideration, with briefs on the merits and oral argument.

Dated, San Francisco, California,
September 24, 1956.

Respectfully submitted,
HENRY C. CLAUSEN,
Counsel for Appellant.

(Appendices Follow.)

Appendix A

In The Supreme Court of the State of California
In Bank

Alfred J. Lundberg,
Plaintiff and Respondent,
vs.
County of Alameda, et al,
Defendants and Appellants,
The Roman Catholic Welfare Corporation of San Francisco (a Corporation),
Intervenor and Appellant.

Plaintiff, a citizen resident of defendant county and a taxpayer therein, brought this suit to challenge the legality of a tax exemption. Such actions are authorized by Section 526a of the Code of Civil Procedure[1] (cf. Delaney v. Lowery, 25 Cal. 2d 561 and, being in aid of the collection of taxes, are distinguishable from

[1]Section 526a of the Code of Civil Procedure provides: "An action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of or injury to, the estate, funds, or other property of a county, town, city or city and county of the state, may be maintained against any officer thereof, or any agent, or other person, acting in its behalf, either by a citizen resident therein, or by a corporation, who is assessed for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax therein. This section does not affect any right of action in favor of a county, city, town, or city and county, or any public officer; provided, that no injunction shall be granted restraining the offering for sale, sale, or issuance of any municipal bonds for public improvements or public utilities."

cases in which a party seeking to avoid taxation was denied mandamus on the ground that an action for refund of illegally collected taxes constituted an adequate remedy at law. (See Security-First Nat. Bk. v. Board of Supervisors, 35 Cal. 2d 323; Vista Irr. Dist. v. Board of Supervisors, 32 Cal. 2d 477; Sherman v. Quinn, 31 Cal. 2d 661.)

The suit involves the constitutionality of that portion of Section 214 of the Revenue and Taxation Code[2]

---

[2]Section 214 of the Revenue and Taxation Code provides:

"Property used exclusively for religious, hospital, scientific, or charitable purposes owned and operated by community chests, funds, foundations or corporations organized and operated for religious, hospital, scientific, or charitable purposes is exempt from taxation if:

(1) The owner is not organized or operated for profit; provided, that in the case of hospitals, such organization shall not be deemed to be organized or operated for profit, if during the immediate preceding fiscal year the excess of operating revenue, exclusive of gifts, endowments and grants-in-aid, over operating expenses shall not have exceeded a sum equivalent to 10 percent of such operating expenses. As used herein, operating expenses shall include depreciation based on cost of replacement and amortization of, and interest on, indebtedness;

(2) No part of the net earnings of the owner inures to the benefit of any private shareholder or individual;

(3) The property is used for the actual operation of the exempt activity;

(4) The property is not used or operated by the owner or by any other person so as to benefit any officer, trustee, director, shareholder, member, employee, contributor, or bondholder of the owner or operator, or any other person, through the distribution of profits, payment of excessive charges or compensations or the more advantageous pursuit of their business or profession;

(5) The property is not used by the owner or members thereof for fraternal or lodge purposes, or for social club purposes except where such use is clearly incidental to a primary religious, hospital, scientific, or charitable purpose;

(6) The property is irrevocably dedicated to religious, charitable, scientific, or hospital purposes and upon the liquidation, dissolution or abandonment of the owner will not inure to the benefit of any private person except a fund, foundation or cor-

which grants a tax exemption to property "used exclusively for school purposes of less than collegiate grade and owned and operated by religious, hospital or charitable funds, foundations or corporations," provided that the property is used for nonprofit purposes and owned by nonprofit organizations. The exemption in question was added to section 214 in 1951 and was approved by the people on referendum at the general election of 1952. This appeal was taken from a judgment declaring the exemption invalid.

In California all property must be taxed unless an exemption is authorized by the state Constitution or granted by the laws of the United States. Section 1c of article XIII of the Constitution declares, "In addition to such exemptions as are now provided in this Constitution, the Legislature may exempt from taxation all or any portion of property used exclusively for

---

poration organized and operated for religious, hospital, scientific, or charitable purposes;

(7) The property, if used exclusively for scientific purposes, is used by a foundation or institution which, in addition to complying with the foregoing requirements for the exemption of charitable organizations in general, has been chartered by the Congress of the United States (except that this requirement shall not apply when the scientific purposes are medical research), and whose objects are the encouragement or conduct of scientific investigation, research and discovery for the benefit of the community at large.

"The exemption provided for herein shall be known as the 'welfare exemption.' This exemption shall be in addition to any other exemption now provided by law. This section shall not be construed to enlarge the college exemption. Property used exclusively for school purposes of less than collegiate grade and owned and operated by religious, hospital or charitable funds, foundations or corporations, which property and funds, foundations or corporations meet all of the requirements of this section, shall be deemed to be within the exemption provided for in Section 1c of Article XIII of the Constitution of the State of California and this section."

religious, hospital or charitable purposes and owned by community chests, funds, foundations or corporations organized and operated for religious, hospital or charitable purposes, not conducted for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual."[3]

The validity of the statutory exemption depends, first, upon whether an educational purpose may be regarded as a charitable purpose within the meaning of section 1c of article XIII. The term charity has been defined in a number of California cases as "a gift to be applied consistently with existing laws, for the benefit of an indefinite number of persons—either by bringing their hearts under the influence of education, or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government." (Estate of Halm, 196 Cal. 778, 781-782; Estate of Coleman, 167 Cal. 212, 214; Estate of Sutro, 155 Cal. 727, 736; Estate of Lennon, 152 Cal. 327, 329-330; Estate of Merchant, 143 Cal. 537, 543-544.) This definition was quoted with approval in Scripps etc. Hospital v. Cal. Emp. Com., 24 Cal. 2d 669, 675, where a nonprofit hospital was held exempt

[3]Section 1c, as adopted in 1944, read as quoted above. The following was added by amendment in 1954: "As used in this section, 'property used exclusively for religious, hospital or charitable purposes' shall include a building and its equipment in the course of construction on or after the first Monday of March, 1954, together with the land on which it is located as may be required for the use and occupation of the building, to be used exclusively for religious, hospital or charitable purposes."

from unemployment insurance taxes as a charitable organization.

An educational purpose has been held to be charitable in character where the status of a trust or bequest was in controversy and the gift was for the benefit of the public and not for private gain. (Collier v. Lindley, 203 Cal. 641, 648-650; Estate of Halm, 196 Cal. 778, 781-782; Estate of Yule, 57 Cal. App. 2d 652, 654; Estate of Bailey, 19 Cal. App. 2d 135, 139; Estate of Bartlett, 122 Cal. App. 375, 377; see Rest., Trusts, § 370; 14 C.J.S. 444.) And in other jurisdictions it has been held that nonprofit educational institutions maintained for the benefit of the public qualify as charitable organizations for the purpose of tax exemption. (School of Domestic Arts and Science v. Carr [Ill.], 153 N.E. 669; Appeal Tax Court v. St. Pet. Acad., 50 Md. 321; Board of Assessors v. Garland School of Home Making [Mass.], 6 N.E. 2d 374; State v. Johnston [N.J.], 46 A. 776; Gerke v. Purcell, 25 Ohio St. 229; In re Hill School [Pa.], 87 A. 2d 259; see In re Cooper's Estate [Iowa], 295 N.W. 448; Morgan v. Presbyterian Church of the United States of America [Ky.], 101 S. W. 338; In re Grace [Minn.], 8 N.W. 761.)

The argument made by plaintiff that the word charitable should be narrowly construed in favor of taxability has been rejected by this court in two recent cases involving section 1c of article XIII. (Y.M.C.A. v. County of L.A., 35 Cal. 2d 760; Fredericka Home v. County of San Diego, 35 Cal. 2d 789.) In the Y.M.C.A. case, where it appeared that the Association operated

at an over-all loss in conducting its various activities, we held that dormitory facilities provided by it at relatively low rentals were exempt as property used exclusively for religious and charitable purposes, pointing out that the dormitories were designed mainly to give young men access to a place for study, recreation and residence under wholesome influences and that, therefore, they were incidental to and reasonably necessary for the accomplishment of the organization's purposes of promoting good character and Christian ideals. We refused to follow a contrary holding in another jurisdiction, noting that one of the factors leading to that decision was a "concept of charity as confined solely to the relief of the needy and destitute ... rather than comprehending as well activities which are humanitarian in nature and rendered for the general improvement and betterment of mankind, though the recipients of such benefits may be able to pay at least in part therefor. . . ." (35 Cal. 2d at p. 768.)

The broad meaning of the term charitable set forth in the Y.M.C.A. case was applied in the Fredericka Home case where it was held that a home for the aged, operated on a nonprofit basis, was entitled to tax exemption as a charity although entrance fees were charged. Both of these decisions relied upon Estate of Henderson, 17 Cal. 2d 853, 857, where it was stated, "A bequest is charitable if: (1) It is made for a charitable purpose; its aims and accomplishments are of religious, educational, political or general social interest to mankind. . . . (2) The ultimate recipients constitute either the community as a whole or an unascertainable and indefinite portion thereof. . . . The chari-

table nature of an institution is determined on the same basis."

The fact that the term charitable is only one of three descriptive words used in section 1c does not require that it be narrowly construed against the exemption. To the contrary, in Scripps etc. Hospital v. Cal. Emp. Com., 24 Cal. 2d 669, where an unemployment insurance tax statute exempted organizations formed for purposes such as "religious, charitable, scientific, literary or educational," it was held that a nonprofit hospital was exempt as a charity although the word hospital was not used in the statute. The court stated, "The wide and varied nature of the exemptions thus provided rather clearly indicates a purpose and intention to give the words here in question a broad rather than a strict meaning. . . ." (24 Cal. 2d at p. 676.)

It thus appears that the word charitable has been given a broad construction in tax exemption cases as well as others, and it would seem clear that nonprofit schools owned by nonprofit organizations and operated for the benefit of the public come within the term charitable as defined by our decisions. Moreover, both the Legislature and the people have construed the term charitable in section 1c of article XIII as authorizing exemption of such schools.

Section 1c is an enabling provision which empowers the Legislature to grant exemptions within certain general categories. In acting under this section the Legislature must necessarily construe the terms of the provision in order to determine the extent of the authority conferred upon it. The Legislature has con-

sistently treated the term charitable in section 1c as broad enough to include nonprofit schools, first, by specifically excluding them from exemption and, second, by specifically granting them an exemption. The first construction was made in 1945 when the Legislature originally enacted section 214 of the Revenue and Taxation Code, which provided for the exemption of property used exclusively for charitable purposes. The Legislature must have then believed that the word charitable as used in section 1c authorized the exemption of nonprofit schools, and that the unqualified use of that term in section 214 would result in exempting such schools, because it added at the end of section 214 a proviso that the section should not be construed to include them.[4] If the word charitable was not broad enough to include nonprofit schools, there would have been no necessity for the proviso, and we cannot assume that the Legislature intended to do a useless thing. The next interpretation of section 1c occurred in 1951 when the Legislature amended section 214 to provide for the exemption of nonprofit schools as charitable organizations. The construction thus placed on section 1c by the Legislature was adopted by the people in 1952 when they approved section 214 on referendum.[5]

---

[4]As enacted in 1945 section 214 of the Revenue and Taxation Code provided, in part, "This section shall not be construed to enlarge the college exemption or to extend an exemption to property held by or used as an educational institution of less than collegiate grade." (Stats. 1945, ch. 241, p. 706.)

[5]Section 214, as submitted to the people, specified that the property therein described "shall be deemed to be within the exemption provided for in Section 1c of article XIII of the Constitution. . . ."

The presumption is in favor of constitutionality, and the invalidity of an act of the Legislature must be clear and unquestionable before the statute can be declared unconstitutional. We cannot adopt our own interpretation of a provision of the Constitution without regard to the legislative construction, and, where more than one reasonable meaning exists, it is our duty to accept that chosen by the Legislature. (Pacific Indemnity Co. v. Industrial Acc. Com., 215 Cal. 461, 464; Kaiser v. Hopkins, 6 Cal. 2d 537, 540; San Francisco v. Industrial Acc. Com., 183 Cal. 273, 279 et seq.; People v. Southern Pacific Co., 209 Cal. 578, 593-594; see also Woodcock v. Dick, 36 Cal. 2d 146, 148; Reynolds v. State Board of Equalization, 29 Cal. 2d 137, 140; Delaney v. Lowery, 25 Cal. 2d 561, 568-569.) This fundamental principle is particularly applicable where, as here, the statute was enacted pursuant to an enabling provision of the Constitution and there is not only a reasonable legislative construction of that provision but also approval of that construction by the people on referendum.

Plaintiff relies strongly upon the legislative history of section 1c in support of his claim that section 214 is unconstitutional. As originally submitted to the Legislature section 1c read, "The Legislature may exempt from taxation all or any portion of the property owned and used for any of the purposes hereinafter mentioned by community chests, funds, foundations or corporations organized and operated for religious, educational, hospital or charitable purposes, no part of the net earnings of which inures to the benefit of any private shareholder or individual." The measure was

entirely recast, and in its final form the word educational was omitted, but there is nothing in the record to show why the provision was revised. As we have seen, nonprofit schools owned by nonprofit organizations and operated for the benefit of the public come within the term charitable, and the Legislature may have omitted the word educational on the theory that, under the authorities here and elsewhere, it was unnecessary to use that specific word in order to authorize the exemption of such schools. In the official voters' pamphlet the argument in favor of adoption of section 1c contained the statement, "Competent legal authority advises that schools other than colleges will not be exempted under this amendment because the Legislature expressly eliminated the term 'educational.'" Numerous other arguments were made, however, for and against adoption, and we cannot say which of the various statements was relied on by the voters. It would be purely speculative to hold that those who voted for the amendment intended to exclude nonprofit schools owned by nonprofit organizations and operated for the benefit of the public. The history of section 1c is inconclusive as to what was intended, and it certainly would not justify a construction of the term charitable contrary to that established by the decisions discussed above, adopted by the Legislature in the 1945 and 1951 sessions, and approved by the people on referendum in 1952. We are satisfied that section 1c authorizes the exemption in question.

It is next argued that the exemption, as applied to schools owned or operated by religious organizations,

is contrary to section 30 of article IV of the California Constitution which provides that the Legislature shall not "grant anything to or in aid of any religious sect, church, creed, or sectarian purpose, or help to support or sustain any school, college, university, hospital, or other institution controlled by any religious creed, church, or sectarian denomination whatever. . . ." This section does not expressly mention tax exemptions, but, even if we assume that it prohibited them, it was superseded by the subsequent adoption of section 1½ of article XIII, which exempts property used exclusively for religious worship, and of section 1c, which, as we have seen, authorizes exemption of nonprofit schools and specifically refers to property owned and operated by religious organizations.

The validity of the exemption is also challenged on the theory that it contravenes that portion of the First Amendment of the federal Constitution which forbids the enactment of laws respecting the establishment of religion. This argument is, of course, pertinent only insofar as the exemption would be available to nonprofit schools operated by religious groups. There are two answers to the contention.

In the first place, it is apparent that the exemption was enacted to promote the general welfare through encouraging the education of the young and not to favor religion, since it is not limited to schools maintained by religious groups but applies also to those operated by other charitable organizations. Under the circumstances, any benefit received by religious denominations is merely incidental to the achieve-

ment of a public purpose. An analogous situation was present in Everson v. Board of Education, 330 U.S. 1, where it was held that a statute authorizing the use of public funds to transport pupils could constitutionally be applied to include the furnishing of transportation to parochial schools. The court reasoned that the statute was designed to promote the general welfare, that a parochial school would benefit upon the same terms as would other schools and that the First Amendment does not require that government be hostile to religion in enacting public welfare legislation. (330 U.S. at p. 16 et seq. Cf. Bowker v. Baker, 73 Cal. App. 2d 653, 663; Opinion of the Justices [N.H.], 113 A. 2d 114, 116.)

Secondly, even if we regard the exemption as benefiting religious organizations, it does not follow that it violates the First Amendment. The practice of granting tax exemptions benefiting religious sects began in the colonial period. (See Paulsen, Preferment of Religious Institutions in Tax and Labor Legislation (1949), 14 Law & Contempt. Prob. 144, 147-148; Torpey, Judicial Doctrines of Religious Rights in America (1948), ch. VI, pp. 171-174; Zollman, Tax Exemptions of American Church Property (1916), 14 Mich. L. Rev. 646, 647-650.) Today, at least some tax exemption for religious groups is authorized by statutory or constitutional provisions in every state and the District of Columbia, as well as by federal law. (See Note (1949) 49 Columb. L. Rev. 968, 969-982.) No case has been found holding that the granting of such exemptions is contrary to state or federal

constitutional provisions prohibiting the support or establishment of religion, and, where the matter has been raised, the exemptions have been upheld. (Garrett Biblical Institute v. Elmhurst State Bank [Ill.], 163 N.E. 1, 5; The Trustees of Griswold College v. The State of Iowa, 46 Iowa 275, 282.) The United States Supreme Court, in discussing the prohibition of laws respecting the establishment of religion, recently stated that the standard of constitutionality is the separation of church and state, and that the problem, like many others in constitutional law, is one of degree. (Zorach v. Clauson, 343 U.S. 306, 314.) The principle of separation of church and state is not impaired by granting tax exemptions to religious groups generally, and it seems clear that the First Amendment was not intended to prohibit such exemptions. Accordingly, an exemption of property used for educational purposes may validly be applied to school property owned and operated by religious organizations.

The judgment is reversed. Certain other appeals were taken which have been rendered moot by this decision, and they are therefore dismissed.

Gibson, C.J.

We concur:

Traynor, J.

Spence, J.

McComb, J.

(Copy)
Lundberg v. County of Alameda
S. F. 19026

DISSENTING OPINION OF SCHAUER, J., TO OPINION OF GIBSON, C. J.

Since 1914 the provisions of section 1a of article XIII of the California Constitution have exempted from taxation the property of a non-profit "*educational institution of collegiate grade, . . .* used exclusively for the purposes of education." (Italics added.) The quoted language is specific; it leaves no room for speculation or "construction." The majority opinion holds that the language of section 1c of the same article of the Constitution, adopted in 1944, which authorizes the Legislature to exempt from taxation property "used exclusively for *religious, hospital* or *charitable* purposes and owned by" (italics added) certain institutions, likewise authorizes the exemption of *all* the property of such institutions which is used for educational purposes of any character or grade—more specifically, property used for *schools of less than collegiate grade.* This holding is reached despite the fact that the word "educational" is notably absent from the 1944 amendment.

To so construe section 1c of article XIII as to encompass educational purposes, in addition to the "religious, hospital or charitable purposes" which are expressly designated in the section, does violence to the plain meaning of the language used, to the intent of the voters who adopted the section, and to settled principles of statutory construction.

First, the Constitution itself is specific in its property tax exemption provisions. Thus, section 1 of article XIII designates as "exempt from taxation . . . property used for free public libraries and free museums, growing crops, property used exclusively for public schools." Section 1a of article XIII declares that "Any educational institution of collegiate grade . . . not conducted for profit, shall hold exempt from taxation its buildings and equipment, its grounds . . . , its securities and income used exclusively for the purposes of education." Other specific exemptions are listed in article IX. Section 10 of that article declares that "All property now or hereafter held in trust for the founding, maintenance or benefit of the Leland Stanford Junior University . . . may be exempted by special act from State taxation . . . and all other real property so held and used by the university for educational purposes exclusively, may be similarly exempted from county and municipal taxation. . . ." Section 11 provides that "All property now or hereafter belonging to 'The California School of Mechanical Arts,' . . . shall be exempt from taxation." Section 12 makes the same provision as to "All property now or hereafter belonging to the 'California Academy of Sciences.'" Section 13 declares that "All property now or hereafter belonging to the Cogswell Polytechnical College . . . shall be exempt from taxation." Section 15 specifies that "All property as of July 1, 1929, held in trust for the founding, maintenance or benefit of the Henry E. Huntington Library and Art Gallery and the increments thereof and all personal property received in exchange therefor shall be exempt

from taxation." In view of these unusually express and specific designations in the Constitution of the property to which the people are willing to grant tax exemption, it appears to me too clear for serious debate among jurists following the law that if by the provisions of section 1c of article XIII it was intended to grant exemption to property devoted to educational purposes, then the language used would have said so, clearly and precisely.

Second, the fact that as originally submitted to the Legislature section 1c referred to property used for "religious, *educational*, hospital or charitable purposes," (italics added) but that before being submitted to the people for a vote the classification of "educational" was deleted from the measure, is a further indication of the intent that property devoted to such purposes not be included in the authorization for exemption. This view is likewise borne out by the presentation of the measure made in the official voters' pamphlet, wherein the argument in favor of adopting section 1c refers to the amendment as "FAIR PLAY FOR CHARITIES" and declares, among other things, that "To be exempted, property must be owned and used exclusively for the purposes stated. The amendment does not authorize exemption of investment property or large land-holdings. Churches and colleges already are exempt. Competent legal authority advises that *schools other than colleges will not be exempted under this amendment because the Legislature expressly eliminated the term 'educational.'*" (Italics added.) At no point

in the arguments concerning the measure, either pro or con, are the above declarations disputed. It thus appears clear that the voters approved the measure in the belief that property used for educational purposes was not included in the authorized exemptions.

Moreover, the fate of other attempted amendments of the Constitution so as to specifically authorize the exemption of property used for private schools of less than collegiate grade expresses more pointedly than can mere words the affirmative intent of the voters of this state that such property continue on the tax rolls. In 1926 a proposed amendment to section 1a of article XIII, submitted as proposition No. 11 on the ballot, to extend the exemption to property used for educational purposes by "any educational institution of secondary grade" was defeated by the vote of the people. Within seven years the issue was again presented, as proposition No. 4 on the 1933 ballot, and again the people refused to amend section 1a so as to extend exemption to the property of "Any private educational institution of less than collegiate grade." It is my firm conviction that this court should not, in the guise of statutory construction, effect an amendment of the Constitution which the voting citizens of California have repeatedly rejected.

Finally, the people of this state, for the purpose of securing the "equality of taxation which results from subjecting all property to the same burden" (*Watchtower B. & T. Soc. v. County of L.A.* (1947), 30 Cal. 2d 426, 429), have provided in section 1 of article XIII of the Constitution that "All property in the

State except as otherwise in this Constitution provided, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law, or as hereinafter provided." To carry out the objective of equality in taxation, "Constitutional provisions and statutes granting exemption from taxation are strictly construed to the end that such concession will be neither enlarged nor extended beyond the plain meaning of the language employed. [Citations.]" (*Cedars of Lebanon Hosp. v. County of L.A.* (1950), 35 Cal. 2d 729, 734; see also *Pacific Home v. County of Los Angeles* (1953), 41 Cal. 2d 844, 849; *Sutter Hospital v. City of Sacramento* (1952), 39 Cal. 2d 33, 39; *Watchtower B. & T. Soc. v. County of L.A.* (1947), *supra,* 30 Cal. 2d 426, 428.) "The provisions of . . . [California's] Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise." (Const., art. I, § 22.) The justice of this court, regardless of personal views on social, political, economic or religious subjects, are in duty bound to support the Constitution and laws of this state. "The powers of the government of . . . California shall be divided into three separate departments—the legislative, executive, and judicial; and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the others, except as in this Constitution expressly directed or permitted." (Const., art. III, §1.) Obedient to my concept of judicial duty I must apply the firmly established principles of construction

above delineated, give effect to the plain intent and specific language of the framers of section 1c of article XIII of the Constitution, respect the principle of division of powers of government above quoted, and hold unauthorized the purported exemption of property, however laudatory the objectives, which is sought to be sustained on the sole basis that the property is "used exclusively for school purposes of less than collegiate grade"—a use which is not of a character specified in the constitutional authorization, and which is therefore beyond the power of either the Legislature or this court to write into the Constitution.

The judgment of the superior court, following the law, should be affirmed.

Schauer, J.

We concur:

Shenk, J.

Carter, J.

Appendix B

In the Superior Court of the State of California, in and for the County of Alameda.

Alfred J. Lundberg, Plaintiff, vs. County of Alameda, City of Oakland, et. al., Defendants, The Roman Catholic Welfare Corporation of San Francisco A (California) Corporation, Intervenor.	No. 247,407 Department No.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The action above came on regularly for trial on June 4 and 5, 1953, by stipulation of the parties, before the court sitting without a jury, a jury not having been demanded, Judges A. J. Woolsey, Cecil Mosbacher, and James R. Agee, presiding, upon the issues joined by the plaintiff's Amended Complaint, plaintiff being represented by Henry C. Clausen, Esq., the Answer thereto of defendants County of Alameda; City of Oakland; Russell C. Horstmann, as County Assessor of Alameda County; Roger Coit, as County Treasurer of Alameda County; Edwin Meese, Jr. as County Tax Collector of Alameda County; Chester

Stanley, as Chairman of the Board of Supervisors of Alameda County; Clifford Rishell, as Mayor of the City of Oakland, said defendants being represented by J. F. Coakley, District Attorney of the County of Alameda; R. Robert Hunter, Assistant District Attorney; Richard H. Klippert, Deputy District Attorney; Richard J. Moore, Deputy District Attorney; John W. Collier, City Attorney of the City of Oakland; Robert E. Nisbet, Deputy City Attorney; Edmund G. Brown, Attorney General of the State of California; and Clarence A. Linn, Assistant Attorney General, and the Answer thereto and Complaint in Intervention of Intervenor, the Roman Catholic Welfare Corporation of San Francisco, a (California) Corporation, said Intervenor being represented by Andrew F. Burke, Esq., and the answer of plaintiff to said Complaint in Intervention, and the court having heard the testimony and considered the evidence and examined the proofs offered by the respective parties, and the cause having been briefed by the said parties and briefs having been filed by Amicus Curiae, and said cause having been submitted to the court for decision, and the court being fully advised in the premises, now makes this its findings of fact and conclusions of law as follows:

FINDINGS OF FACT

1. The court finds that at all times mentioned herein, plaintiff has been and is the owner of real and personal property located in said defendant County and defendant City, and in the State of

California, and a citizen and resident and taxpayer thereof; and assessed for and liable to pay taxes thereon and therein, as provided by law; and within one year before the commencement of this action, has paid taxes thereon and therein.

2. The court finds that the citizen, resident taxpayers of said defendant City and County and of said State number many thousands; that plaintiff and said persons are in the same class; that plaintiff and each and all of said persons are affected by all of the matters and things hereinafter mentioned and are subject to a like injury and damage as the injuries complained of in plaintiff's amended complaint; that there are common questions of law and fact affecting their rights, and a common relief is sought; that these persons united in interest with plaintiff are too numerous to make it practical to bring them before the court and that therefore plaintiff brought this action on his own behalf as such owner, resident, citizen and taxpayer, and also in behalf of all and singular the said citizens and residents and taxpayers of said City and County and State.

3. The court finds that at all times mentioned herein defendant County has been and now is a political subdivision of the State of California, and defendant City has been and now is a municipal corporation organized and existing under and by virtue of the laws of said State.

4. The court finds that defendant County and said defendant officers thereof are charged, as provided by law, with the assessment and receipt of returns of all

property in said County and City for the purpose of collecting real and personal property taxes, and with the receipt of claims and affidavits for exemptions from said taxation; and said defendants are charged, as provided by law, pursuant to said assessment and returns, with the collection of said taxes on all said property, except such taxes and on such property as are exempt therefrom under and in accordance with valid tax exemption laws.

5. The court finds that the legislature of said State, by Chapter 242 of the Statutes of 1951, enacted an amendment to the Welfare Exemption Act, purporting to amend Section 214, Revenue and Taxation Code, which said purported amendment reads as follows:

"An act to amend Section 214 of the Revenue and Taxation Code, relating to the welfare exemption.

The people of the State of California do enact as follows:

Section 1. Section 214 of the Revenue and Taxation Code is amended to read:

214. Property used exclusively for religious, hospital, scientific, or charitable purposes owned and operated by community chests, funds, foundations, or corporations organized and operated for religious, hospital, scientific, or charitable purposes is exempt from taxation if:

(1) The owner is not organized or operated for profit;

(2) No part of the net earnings of the owner inures to the benefit of any private shareholder or individual;

(3) The property is not used or operated by the owner or by any other person for profit regardless of the purposes to which the profit is devoted;

(4) The property is not used or operated by the owner or by any other person so as to benefit any officer, trustee, director, shareholder, member, employee, contributor, or bondholder of the owner or operator, or any other person, through the distribution of profits, payment of excessive charges or compensations or the more advantageous pursuit of their business or profession;

(5) The property is not used by the owner or members thereof for fraternal or lodge purposes, or for social club purposes except where such use is clearly incidental to a primary religious, hospital, scientific, or charitable purpose;

(6) The property is irrevocably dedicated to religious, charitable, scientific, or hospital purposes and upon the liquidation, dissolution or abandonment of the owner will not inure to the benefit of any private person except a fund, foundation or corporation organized and operated for religious, hospital, scientific, or charitable purposes;

(7) The property, if used exclusively for scientific purposes, is used by a foundation or institution which, in addition to complying with the foregoing requirements for the exemption of charitable organizations in general, has been chartered by the Congress of the United States, and whose objects are the encouragement or conduct of scientific investigation, research and discovery for the benefit of the community at large.

The exemption provided for herein shall be known as the 'welfare exemption.' This exemption shall be in addition to any other exemption now provided by law. This section shall not be construed to enlarge the college exemption. Property used exclusively for school purposes of less than collegiate grade and owned and operated by religious, hospital or charitable funds, foundations or corporations, which property and funds, foundations or corporations meet all of the requirements of this section, shall be deemed to be within the exemption provided for in Section 1c of Article XIII of the Constitution of the State of California and this section."

6. The court finds that thereafter, by referendum measure, as provided by law, there was submitted to the electors of California for their approval or disapproval, the said proposed amendment to the Welfare Exemption Act. Said electors of California, by their vote on November 4, 1952, approved said proposed legislation.

7. The court finds that the defendants, and their agents, servants, officers and employees, unless enjoined and restrained by an order of this court, will under and by virtue of said amendment of 1951, fail to assess and tax, and fail to collect taxes, and will receive and approve claims for exemption, in respect of properties used exclusively for school purposes of less than collegiate grade and owned and operated by religious, hospital or charitable funds, foundations, or corporations, which properties and funds, foundations or corporations meet all of the requirements of said

Section 214, as amended, and thereby cast upon and force plaintiff and other taxpayers of said County and City and State to bear and pay the taxes so exempted; said taxes which will be thus borne by plaintiff and said taxpayers, other than those owning the said exempted properties, will constitute a substantial and additional burden, that the amount of taxes for the fiscal year 1952-1953 on such properties, which under said amendment would hereafter be exempt, was $1,123,882.99; that this burden would thus be added to the tax rolls of actual taxpayers, including plaintiff, and meanwhile the persons, corporations or organizations owning said properties thus immune from real or personal taxes, would receive the facilities for which taxes are necessarily levied, namely, fire, police, health and traffic, among others.

8. The court finds that plaintiff has no plain, speedy or adequate remedy at law, and filed his Amended Complaint, in the court above, as a complaint and as an affidavit for the purpose of securing from said court a temporary restraining order and a temporary and a permanent injunction and injunctions against the enforcement and operation of said invalid amendment of 1951.

9. The court finds that the said intention and acts of defendants to enforce and implement said amendment of 1951, by exemption thereunder of said properties, will injure and take from plaintiff and the other taxpayers of said County, and City and State, their said property and property rights, and will cause him and them, material and irreparable loss.

10. The court finds that said amendment of 1951 did not violate Section 24 of Article IV of the Constitution of California in that the title of the ballot by which there was submitted to the electors of California the said referendum did express that there would be exempted thereunder the property of parochial or church schools, said ballot title appearing on the November 4, 1952 State general election ballot, as follows:

	"TAXATION: WELFARE EXEMPTION OF NONPROFIT SCHOOL PROPERTY. Act of Legislature submitted to electors by referendum. Act amends Section 214, Revenue and Taxation Code.	YES
3	Extends property tax exemption, known as welfare exemption, to property used exclusively for schools of less than collegiate grade owned and operated by nonprofit religious, hospital or charitable organizations."	NO

(Boldface type of said ballot underscored by us and capitalized.)

11. The court finds that the said purported amendment to the Welfare Exemption Act purporting to amend Section 214, Revenue and Taxation Code, violates Section 1 of Article XIII of the Constitution of California which provides, in part, that all property in the State, except as otherwise in the Constitution of California provided and not exempt under the laws of the United States shall be taxed in proportion to its value to be ascertained as provided by law, in that there is and was no authorization in the Constitution of California for the exemption of property used for school purposes of less than collegiate grade and owned and operated by religious, hospital or charitable funds, foundations, or corporations.

12. The court finds that Section 1c of Article XIII of the Constitution of California limits, and was intended to limit, the authority of the Legislature to exempt from taxation only "property used exclusively for religious, hospital or charitable purposes and owned by community chests, funds, foundations or corporations organized and operated for religious, hospital or charitable purposes, not conducted for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual"; and it further finds that in proposing and adopting the said Section 1c of Article XIII of the Constitution of California, the Legislature of California and the voters of California did not intend to grant any authorization to the Legislature, or otherwise, to exempt property used for school purposes of less than collegiate grade and owned and operated by religious, hospital or charitable funds, foundations, or corporations, and that said Section 1c of Article XIII did not and does not and was not intended to include any authorization to the Legislature, or otherwise, to exempt any property used for any of said schools; and that said construction here so found is in accordance, among other things:

(a) with the legislative history of said Section 1c of Article XIII, and the fact that the Constitutional Amendment as originally proposed to the legislature originally read as follows:

> "Sec. 1c. The Legislature may exempt from taxation all or any portion of the property owned and used for any of the purposes hereinafter mentioned by community chests, funds, foundations,

or corporations organized and operated for religious, educational, hospital or charitable purposes, no part of the net earnings of which inures to the benefit of any private shareholder or individual."

and that the word "educational" was stricken therefrom before said constitutional amendment was approved by the Legislature or submitted to the people, and

(b) with the official arguments to the electors of said State of California by which the Legislature submitted to said electors the said constitutional provision, Section 1c of Article XIII, for approval or disapproval, on November 7, 1944, and that in said submission the proponents thereof officially represented to said voters as follows:

"Argument in Favor of Assembly Constitutional Amendment No. 17

'FAIR PLAY FOR CHARITIES'

This amendment corrects a serious defect in California's Constitution.

California is the only State which taxes the property of welfare agencies serving youth, old age, the sick and handicapped. Proposition Four authorizes the Legislature to exempt these organizations from property taxes and thus place California in line with the sound and wise practice of the other 47 States.

These nonprofit organizations assist the people by providing important health, citizenship, and welfare services. They are financed in whole or

in part by your contributions either directly or through a Community Chest. It is good public policy to encourage such private agencies by exemption rather than to continue to penalize and discourage them by heavy taxation.

The ability of these agencies to serve you is reduced when a share of your contribution given to aid their work is absorbed by the property tax. The tax has also discouraged and in many cases prevented charitable agencies from securing greatly needed additional facilities to meet growing population needs. Both the present services and the equipment of these agencies are far below normal in California. The tax has thus proved a bad tax in its effect on these important services.

Of California's total tax levy of $316,001,918.00, approximately 383 charities owning real property pay $759,916.21. Exemption of these charities from taxation would mean a loss to counties of only 2/10ths of 1%. To the taxpayer this would mean a possible 1¢ increase per hundred dollars of assessed valuation. Additional health and welfare services resulting from the exemption, in fact, would save taxpayers the entire exemption cost.

The principle of tax exemption for charitable agencies has been recognized in the California Income Tax Law. Proposition Four follows the wording of that law but it is not as broad. Experience under the Income Tax Law has proved that Proposition Four will not open the door to unworthy enterprises seeking to evade taxes. The meaning of every phrase has been clearly defined by the taxing authorities and by the courts. They have successfully confined exemptions to bona fide nonprofit charitable institutions.

To be exempted, property must be owned and used exclusively for the purposes stated. The amendment does not authorize exemption of investment property or large land-holdings. Churches and colleges already are exempt. Competent legal authority advises that schools other than colleges will not be exempted under this amendment because the Legislature expressly eliminated the term 'educational.'

This amendment was proposed by the State Legislature by a vote of 90-7. In a state-wide public opinion survey among California voters a substantial majority expressed their conviction that property used exclusively for religious, hospital and charitable purposes should be tax exempt.

This is sound and timely legislation. Its passage will cure a long-standing defect and an injustice in California tax practice. It will place California in line with the sound policy and experience of the Federal Government and the other States. It should be approved.

CHARLES W. LYON,
Speaker and Member of
the Assembly,
Fifty-ninth District.

THOMAS A. MALONEY,
Speaker Pro Tempore and
Member of the Assembly,
Twentieth District."

and, so finds said construction to be in accordance
(c) with the practical construction placed thereon by
the said California Legislature, in adopting Section

214 of the Revenue and Taxation Code, Chapter 241, Statutes of California of 1945, Section 1, page 706, and passed within six months after the adoption of said Section 1c of Article XIII of the Constitution of California, which Section 214 provided:

"Property used exclusively for religious, hospital, scientific, or charitable purposes owned and operated by community chests, funds, foundations or corporations organized and operated for religious, hospital, scientific, or charitable purposes is exempt from taxation if:

(1) The owner is not organized or operated for profit;

(2) No part of the net earnings of the owner inures to the benefit of any private shareholder or individual;

(3) The property is not used or operated by the owner or by any other person for profit regardless of the purposes to which the profit is devoted;

(4) The property is not used or operated by the owner or by any other person so as to benefit any officer, trustee, director, shareholder, member, employee, contributor, or bondholder of the owner or operator, or any other person, through the distribution of profits, payment of excessive charges or compensations or the more advantageous pursuit of their business or profession;

(5) The property is not used by the owner or members thereof for fraternal or lodge purposes, or for social club purposes except where such use is clearly incidental to a primary religious, hospital, scientific, or charitable purpose;

(6) The property is irrevocably dedicated to religious, charitable, scientific, or hospital purposes and upon the liquidation, dissolution or abandonment of the owner will not inure to the benefit of any private person except a fund, foundation or corporation organized and operated for religious, hospital, scientific, or charitable purposes;

(7) The property, if used exclusively for scientific purposes, is used by a foundation or institution which, in addition to complying with the foregoing requirements for the exemption of charitable organizations in general, has been chartered by the Congress of the United States, and whose objects are the encouragement or conduct of scientific investigation, research and discovery for the benefit of the community at large.

The exemption provided for herein shall be known as the 'welfare exemption.' This exemption shall be in addition to any other exemption now provided by law. This section shall not be construed to enlarge the college exemption or to extend an exemption to property held by or used as an educational institution of less than collegiate grade."

and,

(d) with the contemporaneous construction placed thereon by the Attorney General of California in two opinions found in 5 *Opin. Atty. Gen. Calif.*, pp. 152-155, dated April 5, 1945 and 8 *Opin. Atty. Gen. Calif.*, pp. 72-76, dated August 8, 1946, in which the Attorney General held that the word "charitable" has no fixed and invariable meaning, that the word "char-

itable" is used in Section 1c of Article XIII of the California Constitution in its narrow sense as referring to welfare agencies serving youth, old age, the sick and handicapped, that the argument to the voters in support of the adoption of Section 1c informed them that the language of Section 1c follows the wording of the California Income Tax Law but is not as broad, that the relevant California Income Tax Law provisions are modeled upon the provisions of the Federal Internal Revenue Code, that the said California and Federal Income Tax Law provisions contain language similar to Section 1c except that the words "scientific, literary or educational purposes" have been eliminated from Section 1c and the words "hospital purposes" inserted, that Section 1c is in this sense not as broad as the said income tax provisions, that if the word "charitable" is construed to include property used for scientific, literary, or educational purposes, the exemption in Section 1c would be substantially as broad as the exemption provided by the Income Tax Law, and that the word "charitable" as used in Section 1c was therefore not intended by the people to confer upon the legislature the power to exempt property used for the omitted "scientific, literary or educational purposes", and

(e) with, and said intent not to include educational institutions is further found from, the context and wording of said Section 1c, in view of the fact that the word "charitable" is used in Section 1c in its more limited sense in company with words which normally fall within the broader definition of the word "charitable", and in view of the fact that the word "educa-

tional" is missing from the specified exempt purposes, whereas it has been included in similar exemption provisions in California tax exemption statutes and the Federal Internal Revenue Code.

13. The court finds that the words "religious, hospital or charitable purposes" as used in Section 1c of Article XIII of the California Constitution do not mean or include nor were they intended by the Legislature of said State as proposed or by the people when adopted to mean or include educational purposes.

14. The court finds that the said purported legislation alleged in paragraphs VI and VII of plaintiff's Amended Complaint, by which a later legislature of California sought in 1951 to adopt a Chapter 242 of the Statutes of 1951, insofar as it purported to enact an amendment to the said Welfare Exemption Act by amending Section 214 Revenue and Taxation Code, as set forth in Exhibit "A" to the said Amended Complaint and made a part thereof, and thus referred to and made a part hereof, was and is in violation of Section 1, Article XIII of the California Constitution and is therefore null and void, and in excess of the power and jurisdiction of said Legislature and of the electors to do, pass, enact, provide for or adopt.

15. In view of its other findings of fact and its conclusions of law herein, the Court deems it unnecessary to make any findings with respect to any allegations of plaintiff's amended complaint save and except those with respect to which findings are herein made and, for that reason, it intentionally omits to make any findings with respect to such other allegations.

16. The court finds that all the allegations and denials of the defendants County of Alameda; City of Oakland; Russell C. Horstmann, as County Assessor of Alameda County; Roger Coit, as County Treasurer of Alameda County; Edwin Meese, Jr., as County Tax Collector of Alameda County; Chester Stanley, as Chairman of the Board of Supervisors of Alameda County; Clifford Rishell, as Mayor of the City of Oakland, set forth in their said Answer, inconsistent with the findings above, are not true.

17. The court finds that all the allegations and denials of Intervenor, The Roman Catholic Welfare Corporation of San Francisco, a (California) Corporation, set forth in its Answer and its Complaint in Intervention, inconsistent with the findings above, are not true.

CONCLUSIONS OF LAW

And, as conclusions of law from the foregoing findings of fact, the court concludes, declares and orders:

1. That the court concludes in all respects as set forth in the foregoing Findings of Fact. Said findings have been made upon issues which are determinative of the cause, and any further finding or findings upon issues other than those embraced in the foregoing findings would be immaterial and are not made for that reason.

2. That any conclusion of law that is contained in the foregoing Findings of Fact is hereby expressly incorporated in these conclusions of law by this express reference thereto.

3. That the said purported amendment referred to in paragraphs VI and VII of plaintiff's Amended Complaint, Chapter 242 of the California Statutes of 1951, being said referendum measure known as Proposition 3 and purported to have been approved by the electors of California on November 4, 1952, purporting to enact an amendment to the Welfare Exemption Act, Section 214, Revenue and Taxation Code of California, set forth in Exhibit "A" to plaintiff's Amended Complaint, is, and should be declared to be, violative of Section 1, Article XIII of the California Constitution, and is unconstitutional and therefore null, void, and of no force and effect.

4. That the said defendants County of Alameda; City of Oakland; Russell C. Horstmann, as County Assessor of Alameda County; Roger Coit, as County Treasurer of Alameda County; Edwin Meese, Jr., as County Tax Collector of Alameda County; Chester Stanley, as Chairman of the Board of Supervisors of Alameda County; Clifford Rishell, as Mayor of the City of Oakland, and each of them, their agents, servants, officers and employees, be and should be, enjoined and restrained from carrying into effect the said provisions of said purported law herein declared void, and from failing to assess and tax, and from failing to collect taxes, and from receiving and approving claims for exemption, in respect of said properties referred to in said purported amendment, and from adding to the taxes required to be paid by plaintiff and said other taxpayers of said County of Alameda and said City of Oakland and said State of California, the sum

total or any part of taxes which otherwise would be levied and paid on properties so purported to have been exempted under said void amendment, and said defendants, their said agents, servants and employees, be and should be ordered to restore to the tax and assessment rolls any properties heretofore omitted or excluded therefrom under said void law, and to assess and tax, under the provisions of law applicable thereto, the said properties purported to have been exempted under said void law and to collect said taxes.

Let judgment be entered accordingly.

Dated: September 14, 1953.

A. J. Woolsey,
Judge of the Superior Court.

Cecil Mosbacher,
Judge of the Superior Court.

In the Superior Court of the State of California,
In and For the County of Alameda.

Alfred J. Lundberg, Plaintiff, vs. County of Alameda, City of Oakland, et. al., Defendants, The Roman Catholic Welfare Corporation of San Francisco, a (California) Corporation, Intervenor.	No. 247,407 Department No. 1

JUDGMENT

The action above came on regularly for trial on June 4 and 5, 1953, by stipulation of the parties, before the court sitting without a jury, a jury not having been demanded, Judges A. J. Woolsey, Cecil Mosbacher and James R. Agee, presiding, upon the issues joined by the plaintiff's Amended Complaint, plaintiff being represented by Henry C. Clausen, Esq., the Answer thereto of defendants County of Alameda; City of Oakland; Russell C. Horstmann, as County Assessor of Alameda County; Roger Coit, as County Treasurer of Alameda County; Edwin Meese, Jr., as County Tax Collector of Alameda County; Chester Stanley, as Chairman of the Board of Supervisors of Alameda County; Clifford Rishell, as Mayor of the City of Oakland, said defendants being represented by

J. F. Coakley, District Attorney of the County of Alameda; R. Robert Hunter, Assistant District Attorney; Richard H. Klippert, Deputy District Attorney; Richard J. Moore, Deputy District Attorney; John W. Collier, City Attorney of the City of Oakland; Robert E. Nisbet, Deputy City Attorney; Edmund G. Brown, Attorney General of the State of California; and Clarence A. Linn, Assistant Attorney General, and the Answer thereto and Complaint in Intervention of Intervenor, The Roman Catholic Welfare Corporation of San Francisco, a (California) Corporation, said Intervenor being represented by Andrew F. Burke, Esq., and the Answer of plaintiff to said Complaint in Intervention, and the court having heard the testimony and considered the evidence and examined the proofs offered by the respective parties and briefs having been filed by Amicus Curiae, and said cause having been submitted to the court for decision, and the court heretofore having made and caused to be filed herein its written Findings of Fact and Conclusions of Law, and the Court being fully advised;

Wherefore, by reason of the law and the findings of fact aforesaid, It is Ordered, Adjudged and Decreed that the said purported Amendment to said law referred to in paragraphs VI and VII of plaintiff's Amended Complaint, Chapter 242 of the California Statutes of 1951, being said referendum measure known as Proposition 3 and purported to have been approved by the electors of California on November 4, 1952, purporting to enact an amendment to the Welfare Exemption Act, Section 214, Revenue and Taxa-

tion Code of California, set forth in Exhibit "A", Plaintiff's Amended Complaint, is, and is hereby declared to be violative of Section 1, Article XIII of the California Constitution and is unconstitutional and therefore null, void, and of no force and effect.

It is Further Ordered, Adjudged and Decreed that the said defendants County of Alameda; City of Oakland; Russell C. Horstmann, as County Assessor of Alameda County; Roger Coit, as County Treasurer of Alameda County; Edwin Meese, Jr., as County Tax Collector of Alameda County; Chester Stanley, as Chairman of the Board of Supervisors of Alameda County; Clifford Rishell, as Mayor of the City of Oakland, and each of them, their agents, servants, officers and employees, be and are hereby, enjoined and restrained from carrying into effect the said provisions of said purported law herein declared void, and from failing to assess and tax, and from failing to collect taxes, and from receiving and approving claims for exemption, in respect of said properties referred to in said purported amendment, and from adding to the taxes required to be paid by plaintiff and said other taxpayers of said County of Alameda and said City of Oakland and said State of California, the sum total or any part of taxes which otherwise would be levied and paid on properties so purported to have been exempted under said void amendment, and said defendants, their said agents, servants and employees, be and each is hereby ordered to restore to the tax and assessment rolls any properties heretofore omitted or excluded therefrom under said void amendment,

and to assess and tax, under the provisions of law applicable thereto, the said properties purported to have been exempted under said void law, and to collect said taxes.

It is Further Ordered, Adjudged and Decreed that plaintiff do have and recover from defendants and intervenor his costs and disbursements herein in the sum of $38.45.

Dated this 14th day of September, 1953.

A. J. Woolsey,
Judge of the Superior Court.

Cecil Mosbacher,
Judge of the Superior Court.

Appendix C

In the Superior Court of the State of California
In and For the County of Alameda

Alfred J. Lundberg, Plaintiff, vs. County of Alameda, City of Oakland, et. al., Defendants, The Roman Catholic Welfare Corporation of San Francisco A (California) Corporation, Intervenor.	No. 247,407 Departments Nos. 1, 5 and 11

DISSENTING FINDINGS OF FACT AND CONCLUSIONS OF LAW OF JUDGE JAMES R. AGEE

The action above came on regularly for trial on June 4 and 5, 1953, by stipulation of the parties, before the court sitting without a jury, a jury not having been demanded, Judges A. J. Woolsey, Cecil Mosbacher, and James R. Agee, presiding, upon the issues joined by the plaintiff's Amended Complaint, plaintiff being represented by Henry C. Clausen, Esq., the Answer thereto of defendants County of Alameda; City of Oakland; Russell C. Horstmann, as County Assessor of Alameda County; Roger Coit, as County Treasurer of Alameda County; Edwin Meese, Jr. as County Tax Collector of Alameda County; Chester

Stanley, as Chairman of the Board of Supervisors of Alameda County; Clifford Rishell, as Mayor of the City of Oakland, said defendants being represented by J. F. Coakley, District Attorney of the County of Alameda; R. Robert Hunter, Assistant District Attorney; Richard H. Klippert, Deputy District Attorney; Richard J. Moore, Deputy District Attorney; John W. Collier, City Attorney of the City of Oakland; Robert E. Nisbet, Deputy City Attorney; Edmund G. Brown, Attorney General of the State of California; and Clarence A. Linn, Assistant Attorney General, and the Answer thereto and Complaint in Intervention of Intervenor, the Roman Catholic Welfare Corporation of San Francisco, a (California) Corporation, said Intervenor being represented by Andrew F. Burke, Esq., and the answer of plaintiff to said Complaint in Intervention, and the court having heard the testimony and considered the evidence and examined the proofs offered by the respective parties, and the cause having been briefed by the said parties and briefs having been filed by Amicus Curiae, and said cause having been submitted to the court for decision, and the court being fully advised in the premises, Judge James R. Agee now makes his findings of fact and conclusions of law as follows:

FINDINGS OF FACT

1. That the allegations of paragraphs I and II of said amended complaint are true.

2. That the allegations of paragraph III of said amended complaint are true except that defendant City of Oakland has at all times been and now is a

municipal corporation organized and existing under and by virtue of the laws of the State of California.

3. That the allegations of paragraphs V, VI and VII of said amended complaint are true.

4. That the allegations of paragraph IX of said amended complaint are true except that the additional annual taxes referred to therein is the sum of One Million One Hundred Twenty-three Thousand Eight Hundred Eighty-two and 99/100 Dollars ($1,123,-882.99) or thereabouts.

5. That the allegations of paragraph X of said amended complaint are true except that said amendment of 1951 is valid and not invalid.

6. That the allegations of paragraph XI of said amended complaint are untrue.

7. That the allegations of paragraph VIII of said amended complaint are and each of them is untrue, and in particular:

(a) Said amendment of 1951 does not violate Section 30, Article IV, of the Constitution of the State of California; or Section 8, Article IX, of the Constitution of the State of California; or Section 1, Article XIII, of the Constitution of the State of California.

(b) Said amendment of 1951 does not violate the 1st Amendment to the Constitution of the United States.

(c) Said amendment of 1951 does not violate the 14th Amendment to the Constitution of the United States or Section 1, or Section 11, or Section 13, or

Section 21, of Article I, or Section 25, of Article IV, of the Constitution of the State of California.

(d) Said amendment of 1951 does not violate Section 24, Article IV of the Constitution of the State of California.

8. That it is true that both the Legislature and the Electorate intended that Section 1c of Article XIII of the Constitution of the State of California authorized the Legislature, by appropriate action, to exempt from taxation schools of less than collegiate grade which comply with the requirements of said section and any other laws pertinent thereto.

9. (Note: The rule that findings should be as to ultimate facts and should not include evidentiary and argumentative matters is recognized and Finding 8 above is drawn in conformance with this rule; but see Finding 12, signed by the other two judges; hence, the following finding:)

In 1943, both the Assembly and Senate of the Legislature of California, by a vote in excess of two-thirds of the members of each, passed a proposed amendment to the Constitution of California which was approved and ratified by the people at the general election of November 7, 1944; this amendment (Section 1c, Article XIII) provided that "the Legislature may exempt from taxation all or any portion of property used exclusively for religious, hospital or charitable purposes and . . . not conducted for profit . . ."; the amendment as originally drafted by the Legislature contained the word "educational" in addi-

tion to the words, "religious, hospital or charitable"; said amendment, when re-drafted, was re-phrased and the word "educational" was eliminated; prior to that time there had been many decisions of the appellate courts of this State holding that non-profit educational purposes are "charitable" within the legal meaning of that word; that this legal interpretation is and was in accordance with the settled law of the other states of this country; that the elimination of the word "educational" in the re-draft of the proposed constitutional amendment was for the purpose and with the intent of avoiding surplusage of language; that had the Legislature intended to exclude property used for educational purposes it could have done so in simple language in the proposed constitutional amendment, as illustrated by the language it shortly thereafter did use in the last sentence of section 214 of the Revenue and Taxation Code, as originally enacted by it in 1945; that the then Secretary of the State accepted, caused to be printed and distributed to the voters an argument in favor of the adoption of said amendment; that said argument was made by two members of the then Assembly, to wit, Charles W. Lyon and Thomas A. Maloney; that said argument contained the following: "Competent legal authority advises that schools other than colleges will not be exempted under this amendment because the Legislature expressly eliminated the term 'educational' ". That said argument in favor of said amendment did not represent that this was the intent of the Legislature and was not unequivocal but on the other hand, in effect, warned the

voters that the most that could be said is that some undisclosed "competent legal authority" advised that private nonprofit schools other than colleges were excluded; that the argument against said amendment was prepared by another member of the Assembly, T. Fenton Knight, and distributed to the voters along with the said argument in favor of said amendment; that Knight's argument clearly pointed out that "the language (of the amendment) is so broad that it is impossible for any voter to know just what property he is authorizing the Legislature to exempt. If he does have any clear idea on the subject, it is unlikely to coincide with that of his legislative representative to whom the authority is delegated." That despite this admonition the amendment was favorably voted upon by the people at the general election of 1944. That thereafter, and pursuant to such constitutional amendment, the Legislature in 1945 adopted Section 214 of the Revenue and Taxation Code, the last sentence of which provided: "This section shall not be construed to enlarge the college exemption or to extend an exemption to property held by or to be used as an educational institution of less than collegiate grade." That the inclusion of this last sentence was an interpretation and a recognition by the Legislature that it had the authority to exempt schools of less than collegiate grade but did not at that time desire to make such exemption; that it indicates that the Legislature felt that because of the well-established meaning of the word "charitable" the exemption would automatically apply to said educational institutions in the absence

of such a specific prohibition; that said last sentence of section 214 was not, and was not intended by the Legislature to be meaningless and mere surplusage. That in 1951, by an almost unanimous vote (108 to 3) the Legislature adopted an amendment to said section 214 which made the tax exemption therein provided for available to non-profit schools of less than collegiate grade; that this amendment was submitted to the people by way of referendum and was approved and ratified at the general election of November 4, 1952; that the 1951 amendment even complied, in substance, with the method required to amend the Constitution, to wit, two-thirds of each of the two houses and a majority of the electorate. (Art. XVIII, sec. 1). That the Legislature, in enacting the 1951 amendment, interpreted the Constitution, and in particular Article XIII, section 1c thereof, as authorizing it to grant such exemption, that the electorate, in voting upon the amendment in 1952, likewise interpreted the Constitution as giving such authorization to the Legislature; that the ballot argument against Proposition 3 in the 1952 referendum election stated that the people should vote against the measure because "the constitutional amendment, now claimed to authorize the exemption was never so intended"; that the voters were thus called upon to evidence what they intended by Article XIII, Section 1c, of the Constitution of the State of California; that the people by their vote settled the basic issue of this present litigation, reiterated what they intended by section 1c (the 1944 constitutional

amendment) and confirmed the interpretation placed thereon by the Legislature.

10. That said amendment of 1951 is, in any event, valid as to personal property, all of the requirements of Section 14 of Article XIII of the Constitution of the State of California having been complied with.

CONCLUSIONS OF LAW

1. That the 1951 amendment to Section 214 of the Revenue and Taxation Code is valid in all respects and is not invalid or unconstitutional in any respect.

2. That any conclusion of law contained in the foregoing Findings of Fact is hereby expressly incorporated in these Conclusions of Law by this express reference thereto.

3. That judgment should be entered in favor of defendants.

Dated, September 24, 1953.

James R. Agee,
Judge of the Superior Court.

Appendix D

Alfred J. Lundberg,
Respondent,

vs.

County of Alameda, et al.,
Defendants and Appellants.

Roman Catholic Welfare Corporation of San Francisco,
Intervenor and Appellant.

In the Supreme Court of the State of California
In Bank

Pursuant to certified copy of order of substitution of the Superior Court of the County of Alameda, it is ordered that Paul W. Heisey, as Special Administrator of the Estate of Alfred J. Lundberg, be substituted as party plaintiff-respondent in the above entitled appeal in the place and stead of Alfred J. Lundberg, deceased, and pursuant to certified copy of a further order of the Superior Court of the County of Alameda, it is ordered that Paul W. Heisey, in his individual capacity, be added as an additional plaintiff-respondent in the above entitled appeal.

Appendix E

In the trial court and in the California Supreme Court, pursuant to Rule 23, Rules on Appeal (36 C. 2d 1), and for the reasons set forth in the foregoing Jurisdictional Statement plaintiff requested that Plaintiff's Exhibits 5 and 6 be admitted in evidence and considered. The matter contained in said exhibits may be illustrated by the following pages from Plaintiff's Exhibit 6. It is one of the Roman Catholic High School Religious Series, being Book Three, entitled "Living Our Faith", issued under the official aegis of Cardinal Spellman in 1945. The following excerpts should suffice:

> "The question of union or separation of Church and State has perplexed men since the Protestant Revolt. The ideal situation exists when there is perfect union and accord between Church and State, with each supreme in its own field. Such an achievement, however, seems unlikely in the modern world." (page 246)
>
> * * *
>
> "In a Catholic country, when a dispute arises and settlement is unattainable, the rights of the Church should prevail, since it possesses the higher authority. It is the duty of the State to protect the Church.
>
> "When the majority of the citizens are non-Catholic, the Church does not insist on recognition as the State religion. In a dispute involving matters of faith or morals however, the Church insists on its rights, whatever the cost. An example is the firm stand of the Popes regarding

the education of youth in totalitarian countries." (page 246)

* * *

"If Church and State do not work together, education is harmed, marriage laws prove ineffective, and crime tends to become uncontrolled. Complete separation of Church and State would lead to religious indifference which is just as immoral in the State as in the individual." (page 246)

* * *

"THE CHURCH IN THE UNITED STATES. In this country the Church has flourished to such a degree that we may be inclined to think that separation is a satisfactory and workable plan. The Church holds that this is still a compromise and that the condition is the lesser of two evils." (page 247)

"COUNTERFEIT RELIGIONS. The material, size, and shape of the paper and metal money in the United States is determined and authorized by the government. No other money is legal tender, and any other agency issuing such money is guilty of counterfeiting. In the same way, non-Catholic methods of worshipping God must be branded counterfeit. Each in its own way more or less imitates the true religion, yet lacks the true value of the genuine Faith of Christ. Therefore we cannot practice them without dire penalty.

"NON-CATHOLIC SERVICES. A Catholic who attends a Protestant service violates his Faith in three ways: (1) he sins by false worship; (2) he weakens his own faith, and (3) he gives scandal. The Catholic knows that his is

the only true religion just as clearly as he knows that two and two makes four. Should he associate himself with non-Catholics in religious services, he would join a group which broke away from the true Church established by Christ Himself. Thus he would sin by false worship." (page 112)

* * *

"WEDDINGS AND FUNERALS. Sometimes it may seem obligatory to be present at non-Catholic weddings or funerals because of friendship, or ties created by birth or marriage with those of other religions. If a Catholic should attend such ceremonies, there is always a danger that his mere presence will be looked upon as taking an active part in false worship. Unless there is positive certainty that no scandal will be given, he should not even be a passive spectator at a non-Catholic wedding or funeral.

"NO ACTIVE PART. No matter what the circumstances, a Catholic cannot take an active part in any non-Catholic service. He may never act, therefore, either as a sponsor at a non-Catholic baptismal ceremony, or assist in any part of non-Catholic ritual. There can be no exception to this rule, even though abiding by it may offend our friends. Religious obligations are always more important than social obligations. The loss of earthly friendship is preferable to the loss of the friendship of Christ." (page 112)

* * *

"A FALSE RELIGION. Like all partially Christian sects, such social agencies as the Salvation Army, the Friend's Committee, and the Y.M.C.A. are not a true religion, and acceptance

of them as such is a form of false worship." (page 113)

* * *

"ASSOCIATION WITH NON-CATHOLICS. It is not required that we withdraw into a circle bounded by persons of our own Faith. This was possible when the European world was truly the seat of Christendom and of one belief. The modern world is made up of persons who hold many different creeds, or none. What the Church wishes is that a Catholic do everything possible to protect his God-given Faith against all forces which might lessen it to any degree.

"In our modern materialistic world, Catholics cannot be too careful to avoid the many pitfalls which endanger their Faith. Organizations, which appear outwardly as social in nature, often are the means of undermining belief in everything supernatural. Catholics who are geneuinely interested in preserving their Faith will not seek membership in these groups, even though it may mean greater social prestige or financial opportunities." (page 117)

* * *

"OTHER BANNED GROUPS. There are other societies which are not so severally condemned, but which Catholics may not join. These include the Knights of Pythias, the Odd Fellows, and the Sons of Temperance. These groups are chiefly fraternal, beneficiary, and charitable organizations, but in their foundation and membership they are non-Catholic. For this reason, Catholics, bound to avoid associations harmful to the Faith, may not cooperate with them.

"THE YMCA. The Young Men's Christian Association is an organization first established in

England in 1844 for social and religious work among the young. It grew out of meetings for prayer and Bible-readings which George Williams held in London for workers. As a religious organization, it is forbidden to Catholics. To make use of YMCA recreational facilities, hotel accommodations, and educational programs is not absolutely forbidden, but cooperation with non-Catholic groups can have the effect of lessening the hold on one's Faith." (pages 116-117)

* * *

"MASONRY A RELIGION. Catholics are opposed to Masonry for the same reason that they oppose Protestantism. It is a false religion. According to Mackey's Lexicon of Freemasonry, 'all the ceremonies of our Order begin and terminate with prayer, for Masonry is a religious institution.' It has been a religious organization since its foundation in England in 1717, since which time it has spread over the world, as a universal association." (pages 115-116)

* * *

"The Church is opposed to attendance at non-Catholic schools, for she recognizes the real danger to our faith." (page 55)

"Canon Law states: 'Catholic children shall not attend non-Catholic, neutral, or mixed schools, namely, those which are open also to non-Catholics' (Canon 1374). Therefore, by right and by Church law parents are required to register their children in Catholic schools." (page 238)

* * *

"In the words of Pope Pius XI: 'It is evident that both by right and in fact the mission to edu-

cate . . . belongs to the Church.' This means in practice that students must attend Catholic schools. It is not by any means sufficient that they receive brief instruction outside of school hours. We can only learn, know, and live our religion if we absorb it constantly from our surroundings.

"In the ideal educational atmosphere religion is infused into the whole process of learning. Students should be constantly aware of the unbreakable connection of the world with eternity. Teachers should be Catholics and, whenever possible, religious. Textbooks in every branch of knowledge and on every level of education from the first grade to the end of university training, should be Catholic publications when they are available." (page 237)

* * *

"THE ROMAN INDEX. Whenever we speak of censorship, the question of the Roman Index of Forbidden Books usually arises. This index is a list of books which the Church forbids us to read because they are dangerous to faith and morals. It is composed of two sections:

1. The names of authors and works which are dangerous reading.
2. General classes of books which are forbidden.

"CLASSES OF FORBIDDEN BOOKS. The general classes of books which Catholics may not read because of danger to faith and morals are:

1. All books against faith or the foundations of Catholic belief, such as a denial of the immortality of the soul.

2. All books against Christian morals.
3. All books on religion by non-Catholics, unless their writing agrees with Catholic doctrine.
4. All non-Catholic editions of the Bible, because they are mutilated or changed from the original.
5. All books favoring forbidden societies, such as the Freemasons.
6. All books that advocate superstition, spiritism, or foretelling the future.

Catholics are not only specifically forbidden to read such books but they may not keep, lend, or sell them to others." (pages 152-153)

* * *

"STATEMENTS IN COURT. A witness in court is called upon to tell the truth and nothing but the truth. He may not tell a lie, but if he has a very good reason he may withhold the truth. St. Thomas Aquinas says, 'It is one thing to withhold the truth and another to utter falsehood.' Truth must be revealed insofar as the law obliges it." (pages 213-214)

* * *

"PETER'S PENCE. Just as individual parishes must join in aiding the work of a diocese, so the dioceses unite their financial resources to support the world-wide work of the universal Church as administered by Our Holy Father in Rome. The Pope must give aid to the Church in impoverished or devastated lands; he must aid in the establishment of a clergy in mission lands; he must maintain a large staff which will keep him informed of the trend of all world activities

and thought. For the support of this work in Rome, an annual collection is taken up throughout the world and forwarded to the Vatican. Like all other contributions to God, this Peter's Pence collection shows our willingness to make sacrifices for Him. In doing our share we fulfill a duty of justice; in addition we further the work of the Church throughout the world and share in the merits of Christ's redeeming grace." (page 288)

FILED
OCT 26 1956
JOHN T. FEY, Clerk

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 473

PAUL W. HEISEY,

Appellant,

vs.

COUNTY OF ALAMEDA; CITY OF OAKLAND; RUSSELL C. HORSTMANN, as County Assessor of Alameda County; ROGER COIT, as County Treasurer of Alameda County; EDWIN MEESE, JR., as County Tax Collector of Alameda County; CHESTER STANLEY, as Chairman of the Board of Supervisors of Alameda County; CLIFFORD RISHELL, as Mayor of the City of Oakland; THE ROMAN CATHOLIC WELFARE CORPORATION OF SAN FRANCISCO, Intervenor,

Appellees.

Charlie & Yale

Appeal from the Supreme Court of the State of California.

MOTION TO DISMISS

J. F. COAKLEY,
District Attorney of the County of Alameda,

R. ROBERT HUNTER,
Chief Assistant District Attorney,

RICHARD J. MOORE,
Deputy District Attorney,

MAURY ENGEL,
Deputy District Attorney,
Court House, Oakland 7, California,
Attorneys for Defendant and Appellee County of Alameda.

JOHN W. COLLIER,
City Attorney of the City of Oakland,

ROBERT E. NISBET,
Deputy City Attorney,
City Hall, Oakland 12, California,
Attorneys for Defendant and Appellee City of Oakland.

EDMUND G. BROWN,
Attorney General of State of California,

CLARENCE A. LINN,
Assistant Attorney General,
State Bldg., San Francisco 2, Calif.,
Attorneys for Defendants and Appellees.

SUBJECT INDEX

	Page
Motion to Dismiss	1
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statement	3
Argument	5
I. Appellant's Claim That the 1951 Amendment to Section 214 Violates the First and Fourteenth Amendments Does Not Present a Substantial Federal Question	5
II. Appellant Lacks Standing to Maintain This Action	10
Conclusion	14

TABLE OF AUTHORITIES CITED

Cases

Alabama State Federation of Labor v. McAdory, 325 U.S. 450	13
Bell's Gap Railroad Co. v. Pennsylvania, 134 U.S. 232	9
Coler v. Corn Exchange Bank, 250 N.Y. 136; 164 N.E. 882	7
Darnell v. Indiana, 226 U.S. 390	8
Doremus v. Board of Education, 342 U.S. 429	10, 13
Everson v. Board of Education, 330 U.S. 1	7, 8, 9
First Methodist Episcopal Church South v. Atlanta, 76 Ga. 181	7
Garrett Biblical Institute v. Elmhurst State Bank, 331 Ill. 308; 163 N.E. 1	7
Gibbons v. District of Columbia, 116 U.S. 404	8
Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203	7
Jackman v. Rosenbaum Co., 260 U.S. 22	5
Jeffrey Manufacturing Co. v. Blagg, 235 U.S. 571	8
Kies v. Lowrey, 199 U.S. 233	9
Merchants' and Manufacturers' Bank v. Pennsylvania, 167 U.S. 461	9
Metropolitan Street Railway Co. v. New York State Board of Tax Commissioners, 199 U.S. 1	9
Pierce v. Society of Sisters, 268 U.S. 510	9
Pritchard v. County Court of Kanawha County, 109 W. Va. 429; 155 S.E. 542	7
Public Service Commission v. Wycoff Co., 344 U.S. 237	13
Rawlins v. Georgia, 201 U.S. 638	9
State v. Collector of Jersey City, 24 N.J.L. 108	8
The Trustees of Griswold College v. The State of Iowa, 46 Iowa 275	7

TABLE OF AUTHORITIES CITED (Continued)

	Page
United Public Workers v. Mitchell, 330 U.S. 75	13
White v. Smith, 189 Pa. 222; 42 A. 125	7
Williams v. Baltimore, 289 U.S. 36	9
Williams v. Riley, 280 U.S. 78	10
Zorach v. Clauson, 343 U.S. 306	7, 8

CONSTITUTIONS

California Constitution: Article XIII, Section 1a	7

RULES

Revised Rules of the Supreme Court of the United States, Rule 16(1)	1

STATUTES

California Education Code, Sections 16601 and 16624	5, 8
California Government Code	
Section 29040	11
Section 29060	11
Section 29061	11
Section 29070	11
Section 29071	11
Section 29072	11
Section 29074	11
Section 29080	11
Section 29091	12
Section 29120	12
California Revenue and Taxation Code, Section 214	3, 4
U.S.C., Title 28, Section 1257(2)	2

TEXTS AND OTHER AUTHORITIES

Gabel, Public Funds for Church and Private Schools (1937), p. 566	6
12 Hening, Statutes of Virginia (1823), 84	6
Virginia Statutes at Large, Sheperd, Continuation of Hening, p. 149, 200	6
Torpey, Judicial Doctrines of Religious Rights in America (1948), Ch. VI	6
Zollman, Tax Exemptions of American Church Property (1916), 14 Mich. L. Rev. 646, 647-650	6

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 473

PAUL W. HEISEY,

Appellant,

vs.

COUNTY OF ALAMEDA; CITY OF OAKLAND; RUSSELL C. HORSTMANN, as County Assessor of Alameda County; ROGER COIT, as County Treasurer of Alameda County; EDWIN MEESE, JR., as County Tax Collector of Alameda County; CHESTER STANLEY, as Chairman of the Board of Supervisors of Alameda County; CLIFFORD RISHELL, as Mayor of the City of Oakland; THE ROMAN CATHOLIC WELFARE CORPORATION OF SAN FRANCISCO, Intervenor,

Appellees.

Appeal from the Supreme Court of the State of California.

MOTION TO DISMISS

Appellees County of Alameda and City of Oakland move, pursuant to Rule 16(1) that the appeal from the final judgment of the Supreme Court of California be dismissed for want of jurisdiction on the grounds (1) that the appeal does not present a substantial

federal question, and (2) that the appeal does not present a justiciable case or controversy within the jurisdiction of this Court.

OPINIONS BELOW

The opinion of the Supreme Court of California (Jur. St., App. A) is reported at 48 A. C. 648, 298 P. 2d 1. The findings of fact and conclusions of law of the Superior Court of the State of California in and for the County of Alameda (Jur. St., App. B) are not reported.

JURISDICTION

The judgment of the Supreme Court of California was filed on June 6, 1956, and the petition for rehearing was denied without opinion on July 5, 1956. Notice of Appeal was filed on August 3, 1956. The jurisdiction of this Court is sought to be invoked under U. S. C., Title 28, Section 1257(2).

Jurisdiction is challenged by this motion.

QUESTIONS PRESENTED

California, by legislation in 1951 which was approved by referendum in 1952, exempted from taxation property used exclusively for school purposes of less than collegiate grade and owned and operated by nonprofit religious, hospital or charitable funds, foundations or corporations. Appellant sought by injunction to prevent the local authorities in Alameda County, where he resides, from according the exemption to the

schools falling within the description of the statute. The questions presented are:

1. Does the statutory exemption violate the Fourteenth Amendment to the Constitution, to the extent that it applies to the States the prohibition of the First Amendment?

2. Does appellant have standing to raise any question in this Court?

STATEMENT

In 1951, the legislature of California, by amendment to Section 214 of the Revenue and Taxation Code of that State, exempted from taxation "Property used exclusively for school purposes of less than collegiate grade and owned and operated by (nonprofit) religious, hospital or charitable funds, foundations or corporations . . ." The amendment was approved by referendum vote of the electorate of California at a general election in November, 1952.

In February, 1953, one Alfred J. Lundberg commenced this action against the County, the City of Oakland, which is in Alameda County, and certain county and city officers, to enjoin them from granting a tax exemption to the schools falling within the requirements of the 1951 amendment to Section 214. Lundberg claimed to sue on his own behalf as a resident, citizen and taxpayer of the city and county, and in behalf of all other citizens, residents and taxpayers of said city and county who were similarly situated.

The Amended Complaint, filed in May, 1953, challenged the amendment to Section 214 on a variety of grounds. Apart from those which related to the Constitution of California and which are no longer significant here, it charged that the amendment was invalid under the Fourteenth Amendment to the Federal Constitution in that (1) it arbitrarily distinguished between nonprofit, private schools and private schools which are operated for profit (VIII|c| and |d|); and (2) it would be enforced "in a grossly disproportionate manner" to exempt "the property of parochial schools of one particular sect, and of which plaintiff is not a member" (VIII|c|); and that (3) it violated the First Amendment as applies to the States under the Fourteenth Amendment (VIII|b|).

The case was tried in June, 1953, before three judges in the Superior Court in and for the County of Alameda. On September 14, 1953, a majority of that court filed findings of fact and conclusions of law holding that the 1951 amendment to Section 214 was invalid as in conflict with the Constitution of California. The majority made no findings, and reached no conclusions on the Federal constitutional issues (Jur. St., App. B., pp. 20-38). The third judge, in dissent, found the 1951 amendment constitutional in all respects (Jur. St., App. B., pp. 43-50).

On appeal from that judgment, the Supreme Court of California reversed. The majority of that court, devoting the greater part of its discussion to the issues relating to the Constitution of California, held the

1951 amendment to be valid in all respects (Jur. St., App. A., pp. 1-13). Three justices dissented, solely on the *State* constitutional grounds (Jur. St., App. A., pp. 14-19).

The opinion of the Supreme Court of California was handed down on June 6, 1956. On June 14, 1956, Alfred J. Lundberg died. Shortly thereafter the present appellant, Paul W. Heisey, moved, *ex parte*, in the Superior Court that he be added, in his individual capacity, as an additional plaintiff, and upon obtaining an order to that effect, he was brought into the case in the Supreme Court of California (Jur. St., App. D., p. 51). He filed a petition for rehearing, which was denied on July 5, 1956, and he is the appellant here. No personal representative of Alfred J. Lundberg, the original plaintiff, has appealed.

ARGUMENT

I. APPELLANT'S CLAIM THAT THE 1951 AMENDMENT TO SECTION 214 VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

Appellant, in asking this Court to set aside the tax exemption of private, nonprofit schools below the collegiate grade, directly challenges the right of any State, under the Federal Constitution, to thus exempt any schools in which religious instruction is given in addition to the secular education required of all schools under state law. (California Education Code, Sections 16601, 16624.) Appellant claims the Fourteenth Amendment prohibits this exemption because it incorporates the prohibitions of the First Amendment

against laws "respecting an establishment of religion or prohibiting the free exercise thereof."

The answer to this sweeping charge is that given many years ago by Mr. Justice Holmes: The Fourteenth Amendment, itself a historical product, did not destroy history for the States." *Jackman* v. *Rosenbaum Co.*, 260 U. S. 22, 31. Religious schools and colleges have been accorded tax exemption by the States from the earliest days of our history.[1] Virginia, for example, was among the earliest and most vigorous of the States in its legislative policy against any form of religious establishment. The Virginia Bill for Religious Liberty (12 Hening, Statutes of Virginia [1823] 84) was adopted in 1785, and in 1799 Virginia passed a further act closing all possible loopholes left by the original statute, and repealing a long list of earlier acts which retained the vestiges of establishment (Virginia Statutes at Large, Sheperd, Continuation of Hening, p. 149). Yet in the following year, 1800, Virginia adopted a statute granting complete tax exemption to all property belonging to any "houses for divine worship or seminary of learning" (*id.*, p. 200).

Not only is the exemption of long standing, but it is also universally in force today. The very exemption which is now challenged in California exists in every one of the forty-eight states and in the District of Columbia.[2] California, which had accorded the exemp-

[1] Zollman, Tax Exemptions of American Church Property (1916), 14 Mich. L. Rev. 646, 647-650; Torpey, Judicial Doctrines of Religious Rights in America (1948), Ch. VI.

[2] The constitutional and statutory provisions granting the exemption are collected in Gabel, Public Funds for Church and Private Schools, p. 566 (1937).

tion to religious schools of collegiate grade since 1914 (Cal. Const., Art. XIII, Sec. 1a), has by the 1951 amendment extended the exemption to all schools, of whatever grade, thus removing the last exception to the universality of that exemption in the United States.

In the light of all this, it is not surprising that in the few cases in which the exemption has ever been challenged, either under the First and Fourteenth Amndments, or under provisions similar to the First Amendment which are found in state constitutions, it has been sustained. *Garrett Biblical Institute* v. *Elmhurst State Bank*, 331 Ill. 308, 163 N. E. 1 (1928); *The Trustees of Griswold College* v. *The State of Iowa*, 46 Iowa 275 (1877); *see also White* v. *Smith*, 189 Pa. 222, 42 A. 125 (1899); *Pritchard* v. *County Court of Kanawha County*, 109 W. Va. 429, 155 S. E. 542 (1950); Cf. *First Methodist Episcopal Church South* v. *Atlanta*, 76 Ga. 181, 196 (1886).

To contend, as appellant does, that this "verdict of quiescent years" (Cardozo, C. J., in *Coler* v. *Corn Exchange Bank*, 250 N. Y. 136, 141; 164 N. E. 882, 884 [1928], aff'd 280 U. S. 218) has been upset by the recent decisions of this Court, requires no extended comment. The exposition which the First Amendment has received in *Everson* v. *Board of Education*, 330 U. S. 1; *Illinois ex rel. McCollum* v. *Board of Education*, 333 U. S. 203; and *Zorach* v. *Clauson*, 343 U. S. 306, shows nothing which would condemn a statute which grants an exemption from taxes to all nonpublic, nonprofit private schools, whether or not they are

owned or supported by religious groups. That amendment, as the Court observed in the *Everson* case (330 U.S. at p. 18), "requires the state to be a neutral in its relations with groups of religious believers and nonbelievers; it does not require the state to be their adversary." The Court later added, in *Zorach* v. *Clauson*, 343 U. S. 306, 314: "But we find no constitutional requirement which makes it necessary for Government to be hostile to religion . . ." California has now simply extended its neutrality from the collegiate level to the entire range of private schools, as each of its sister states had already done many years before. Indeed, were the First and Fourteenth Amendments to condemn the exemption involved here, they would seem to condemn, *a fortiori*, the tax exemption which has been accorded to churches and other places of public worship, which is "so entirely in accord with the public sentiment that it universally prevailed." *State* v. *Collector of Jersey City*, 24 N. J. Law 108, 120 (1853). Cf. *Gibbons* v. *District of Columbia*, 116 U. S. 404, 408.

No more than a word is necessary on the additional questions which appellant seeks to raise under the due process and equal protection clauses of the Fourteenth Amendment (Jur. St., pp. 6-9).[1] Appellant's questions 2, 3 and 6, though somewhat differently phrased, appear to be based on the assertion that the 1951 exemption deprives appellant of property for a nonpublic

[1] Contrary to appellant's statement (Jur. St., pp. 16, 17), those questions were not raised by the Amended Complaint. They were not passed upon by the Court below (Jur. St., App. A). They are alluded to only by argument and in brief. They are not open here. Furthermore, it nowhere appears that either Lundberg, the original plaintiff, or Heisey, the appellant, belong to any class for whose sake the equal protection clause could be invoked. See *Darnell* v. *Indiana*, 226 U. S. 390, 398; *Jeffrey Manufacturing Co.* v. *Blagg*, 235 U. S. 571, 576.

purpose because most of the nonpublic schools teach sectarian and denominational doctrine in addition to secular studies.[1]

This Court rejected a similar argument in the *Everson* case (330 U. S. at p. 7): "It is much too late to argue that legislation, intended to facilitate the opportunity of children to get a secular education serves no public purpose." Cf. *Pierce* v. *Society of Sisters*, 268 U. S. 510. Moreover, in extending tax exemptions, the range of discretion accorded to the legislative authority is extremely broad. *Bell's Gap Railroad Co.* v. *Pennsylvania*, 134 U. S. 232, 237; *Metropolitan Street Railway Co. v. New York State Board of Tax Commissioners*, 199 U. S. 1, 47, 50; and *Williams v. Baltimore*, 289 U. S. 36, 42.

Questions 4, 5 and 7 (Jur. St., pp. 7-9) are obviously thinly veiled attempts to present to this Court the questions of State law which were passed upon by the California Court. Clearly, appellant cannot, under the guise of the Fourteenth Amendment, extend this Court's jurisdiction to a review of the construction of a State's constitution by its highest court. *Rawlins* v. *Georgia*, 201 U.S. 638; *Kies* v. *Lowrey*, 199 U.S. 233; and *Merchants' and Manufacturers' Bank* v. *Pennsylvania*, 167 U. S. 461.

[1] No private school, whether tax-exempt or not, may operate in California unless it maintains a curriculum of secular education which complies with the state standards for public schools. California Education Code, Sections 16601, 16624.

II. APPELLANT LACKS STANDING TO MAINTAIN THIS ACTION.

In addition to the absence of any substantial federal question, the appeal must also be dismissed because of the lack of any sufficient standing by appellant to prosecute it. Appellant purports to sue as a taxpayer, a resident and a citizen of Alameda County, and on behalf of all other taxpayers, residents and citizens similarly situated. Clearly, that he is a resident or a citizen, or a representative of other residents or citizens, gives him no standing to complain. *Doremus* v. *Board of Education*, 342 U. S. 429. Appellant must show, "not only that the (state) statute is invalid but that he has sustained or is in immediate danger of sustaining some direct injury as a result of its enforcement" *(id.*, at p. 434). As the Court stated in *Williams* v. *Riley*, 280 U. S. 78, 80:

> "The federal courts have no power *per se* to review and annul acts of state legislatures upon the ground that they conflict with the federal or state constitutions. 'That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act.' "

Passing for the moment the additional problems raised by the death of the original plaintiff, Lundberg, and the addition of the present appellant, it is apparent, under Federal law, that from the outset this has not been a "good faith pocketbook action." *Doremus* v. *Board of Education*, 342 U. S. 429, 434.

This action was begun, and the trial held, before the beginning of the first fiscal year in which the assailed exemption was to take effect;[1] before any application for exemption under the amended statute had been approved;[2] before—insofar as the record shows—the various county officials had so much as filed the preliminary itemized statements of anticipated revenue and expenditures for the new fiscal year, the first step to be taken in a multi-step process culminating in the computation of a new tax rate.[3]

Apparently appellant assumes that none of these considerations are material, and that standing to maintain the suit can be shown by a speculative calculation

---

[1]The original complaint was filed February 2, 1953; the amended complaint was filed May 12, 1953. The trial was held on June 4, 1953. The first fiscal year in which the exemption was to take effect began July 1, 1953. A representative of the Assessor's Office testified at the trial that the tax rate for the incoming year was not yet known. (Settled Statement, p. 44, lines 19-20.)

[2]Settled Statement, pp. 44-51.

[3]California Government Code Section 29040 (1952) provides that:

> "On on before July 10 in each year as the board [of supervisors] directs, each county official or person in charge of any office, department, service, institution, or district of a county . . . shall file with the county auditor an itemized estimate of anticipated revenue and expenditures."

From these estimates the auditor is to prepare a tabulation showing the complete expenditure program of the county and special districts for the budget period and the source of revenue by which it is to be financed. [Sections 29060, 29061.]

Section 29070 provides that:

> "The tabulation shall be submitted by the auditor to the clerk of the board on or before July 30 of each year as the board directs."

The board is to consider the tabulation and on or before August 10 of each year "make . . . any revisions, reductions or additions therein that it deems advisable." [Section 29071.]

The tabulation as revised constitutes the "preliminary county budget for the period for which it is intended to apply." [Section 29072.]

Sections 29074 and 29080 deal with a procedure whereby taxpayers may appear at a meeting of the board on or before August 10 of each year and be "heard regarding the increase, decrease or omission of any item of the budget or for the inclusion of additional items."

Finally, Section 29091 provides that "not later than August 30 of each year" and after making any changes in the preliminary budget it deems advisable "the board shall by resolution adopt the budget as finally determined." On or before September 1 of each year the board then fixes the rates of county and district taxes on the secured roll designating the number of cents levied on each $100 of taxable value. (Section 29120.)

involving uncertain data for a period when the assailed exemption was not yet in effect. Thus, he can only assert that *if* the property of nonprofit private schools had been exempted during the 1952-1953 fiscal year, and *if* expenditures for public schools had been maintained at the same level, and *if* the loss of revenue from the exemption has not been met by resort to other sources of revenue, then the tax rate on property in Alameda County, some of which was owned by appellant, would have risen one cent and four mills per hundred dollars of assessed valuation.

This triple hypothesis ignores the obvious fact that the only action which could affect a taxpayer's pocketbook is an increased revenue derived from taxes, part of which he must pay; an exemption of another from a tax may, or may not have that effect. There is no evidence in the record here that the exemption operated to increase anyone's taxes. Moreover, the statute involved leaves the Board of Supervisors of Alameda and other counties free to raise revenue from various sources. The tax rates on the secured roll are arrived at only after the "total appropriations and reserves" are reduced by "the amount of estimated revenue from other sources" and "available surplus."[1]

It is not enough for a party to ask this Court to "*guard against the possibility*" that a taxing authority will exercise its discretion in such a way as to cause

[1]Section 29120 provides:

that the rates fixed by the board "shall be such as will produce . . . the amount found by deducting from the total appropriations and reserves:

(a) The amount of estimated revenue from other sources.

(b) Available surplus."

injury to him. *Public Service Commission* v. *Wycoff Co.*, 344 U. S. 237, 244 (1952). It is not enough that a threat of injury by a board or agency be implied by the existence of laws which it is empowered to effectuate. *United Public Workers* v. *Mitchell*, 330 U. S. 75, 91 (1946). "Conflicts of interest must be 'ripe for determination' . . . must not be nebulous or contingent but must have taken on fixed or final shape so that a court can see what legal issues it is deciding, what effect its decision will have on the adversaries . . ." *Public Service Commission* v. *Wycoff Co., supra*, at p. 244. See also *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450, 461 (1945).

The deficiences which existed in respect to the standing of the original plaintiff, Lundberg, are accentuated by the addition of the present appellant, Heisey, after the decision in the California Supreme Court. Although he was added as a plaintiff-appellant in the California courts (Jur. St., App. D) there are no findings as to his position, such as there were as to Lundberg (Jur. St., App. B, pp. 21-22). All that appears in the record is his *ex parte* motion, supported by an affidavit containing a bare allegation that appellant owns real and personal property in the County of Alameda, the value of which is not specified, and has paid taxes there since 1950. That this *ex parte* allegation may suffice in California courts is not enough to show that it would suffice here. *Doremus* v. *Board of Education, supra.*

CONCLUSION

Wherefore, the motion to dismiss the appeal should be granted.

Respectfully submitted,

J. F. COAKLEY,
District Attorney of the County of Alameda,

R. ROBERT HUNTER,
Chief Assistant District Attorney,

RICHARD J. MOORE,
Deputy District Attorney,

MAURY ENGEL,
Deputy District Attorney,
Attorneys for Defendant and Appellee County of Alameda.

JOHN W. COLLIER,
City Attorney of the City of Oakland,

ROBERT E. NISBET,
Deputy City Attorney,
Attorneys for Defendant and Appellee City of Oakland.

EDMUND G. BROWN,
Attorney General of the State of California,

CLARENCE A. LINN,
Assistant Attorney General,
Attorneys for Defendants and Appellees.

FILED
OCT 29 1956
JOHN T. FEY, Clerk

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1956

No. 473

PAUL W. HEISEY,

Appellant,

vs.

COUNTY OF ALAMEDA; CITY OF OAKLAND; RUSSELL C. HORSTMANN, as County Assessor of Alameda County; ROGER COIT, as County Treasurer of Alameda County; EDWIN MEESE, JR., as County Tax Collector of Alameda County; CHESTER STANLEY, as Chairman of the Board of Supervisors of Alameda County; CLIFFORD RISHELL, as Mayor of the City of Oakland; THE ROMAN CATHOLIC WELFARE CORPORATION OF SAN FRANCISCO, Intervenor,

Appellees.

MOTION TO DISMISS APPEAL

and

SUPPORTING BRIEF.

ANDREW F. BURKE,
1408 Hobart Building, San Francisco 4, California,
Attorney for The Roman Catholic Welfare Corporation of San Francisco, a (California) corporation, Intervenor-Appellee.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

Subject Index

Page

I. Nature of Cause 3

II. Statement of Facts 3

III. Questions Presented by the Appeal 12

IV. Summary of Argument 14

V. Argument 18

A. Appellant's Contentions do not Present a Judiciable "Case" or "Controversy" within the Jurisdiction of the Court, because the Record Fails to show that Appellant has Sustained or is in Immediate Danger of Sustaining any *Direct* Injury (in the Nature of a Money Loss) from the Operation of the Exemption Granted by the Challenged Statute 18

B. Appellant's Contention Based upon the First Amendment does not Present a *Substantial* Federal Question 24

1. The "Establishment of Religion" Clause of the First Amendment does not Justify (Much Less Require) Antagonism to Religion or Religious Institutions 24

2. The so-called religious schools serve a public purpose and promote the "public welfare" .. 26

3. The challenged Statute was Enacted for the *Public* Purpose of Aiding *Education*, and, thus, Promoting the General Welfare; the Benefit which the Private Schools *which Teach Religion* (in Common with *Private* Schools which do *not* Teach Religion) Derive from its Operation is an *Incidental* and *Consequential* Benefit, only, which does not Bring it within the Prohibition of the "Establishment of Religion" Clause of the First Amendment 27

4. The Principles Mentioned Above are Particularly Applicable to Statutes which Grant *Tax*

Page

Exemptions to Churches, Religious Schools or Other Religious organizations 30

(a) Tax exemption was granted to churches and religious schools by the colonies, and by certain states prior to the adoption of the First Amendment and has been granted by other states and by the Federal Government since shortly after the adoption of the First Amendment and has always been recognized as a legitimate and proper exercise of legislative power. Therefore, (in the absence of specific language evidencing a contrary intent—and there is none such) a tax exemption should not be considered as being within the philosophy or purpose of the prohibition of laws "respecting an establishment of religion" contained in the First Amendment 30

(b) Exemptions from taxes have never been regarded as *grants* of *public* property, within the operation of state constitutional provisions, similar in form or substance to the "establishment of religion" clause of the First Amendment or state constitutional provisions, which prohibit *grants* of *public* property to *sectarian* organizations or for *sectarian* purposes nor as compulsory "support" by citizens of churches of which they were not members, contrary to constitutional provisions prohibiting such compulsory support 32

(c) If we assume that a tax exemption granted to *religious* schools, *if made for the primary purpose of aiding religion*, would violate the "*establishment of religion*" clause of the First Amendment, such result cannot properly be claimed for the

Page

tax exemption granted by the challenged statutes, to *religious* schools, because the *primary* purpose of the exemption (which is granted to *religious* and *non-religious* schools alike) is *not* to aid *religion* but rather *to aid secular education* and, thus, to promote the "general welfare" 36

5. There is Nothing in *Everson v. Board of Education*, 330 U. S. 1, which is inconsistent with the Views Expressed Above 37

C. None of the Appellant's Contentions, Based Upon the "Due Process" and/or the "Equal Protection" Provisions of the Fourteenth Amendment Presents a "Substantial" Federal Question or Possesses any Merit 37

1. Neither the "Due Process" nor the "Equal Protection" Provisions of the Fourteenth Amendment, Considered Alone, Imposes any Restriction upon the Power of a State to Grant such Tax Exemptions as it may Deem Proper 38

2. There is no Merit in Appellant's Various Contentions by which he Seeks to show that the Challenged Statute Violates his Rights under the "Equal Protection" and "Due Process" Provisions of the Fourteenth Amendment .. 38

(a) There is no merit in appellant's contention (based upon Brown v. Board of Education, 347 U. S. 483) that the challenged statute violates the "equal protection" provision of the Fourteenth Amendment, by failing to make education "available to all on equal terms" 38

(b) There is no merit in appellant's contention (based upon his assertions that *religious* schools are in "competition" with *public* schools and do not serve a *public* pur-

Page

pose), that the exemption of *religious* schools, increases his taxes and takes his property for a *non-public* purpose..... 39

(c) Appellant's contention that the challenged statute violates the California Constitution, because it exempts property "without a specific constitutional authorization", raises no *federal* question, but a *state* question only, which is foreclosed by the judgment of the Supreme Court of California 39

3. Appellant's Contentions that the Superior Court of Alameda County and the Supreme Court of California Erred in Rejecting the Original Plaintiff's Proffer of Evidence Respecting the Religious Doctrines Taught in the Catholic Schools of California, and that the Supreme Court Erred in Refusing to Make Findings in Favor of the Original Plaintiff on the Basis of the Rejected Evidence do not Present *Federal* Questions, but *State* Questions Only, Based Upon Rulings in Respect of *State* Practice, and are Foreclosed by the Judgment of the Supreme Court of California 40

VI. Conclusion 42

Table of Authorities Cited

Cases	Pages
Alabama Federation of Labor v. McAdory, 325 U. S. 451	23
Baltimore City v. Minister and Trustees of Starr Methodist Protestant Church, 106 Md. 281; 67 A. 261	34
Barrington v. Missouri, 205 U. S. 483; 51 L. ed. 890; 27 S. Ct. 582	40
Bell's Gap Railroad Co. v. Pennsylvania, 134 U. S. 232	21, 28
Board of Education v. Illinois, 203 U. S. 553	28
Board of Education of Baltimore County v. Wheat, 174 Md. 314; 199 Atl. 628	35
Brown v. Board of Education, 347 U. S. 483; 98 L. ed. 873; 74 S. Ct. 686	16, 17, 27, 38, 39
Carmichael v. Southern Coal Company, 301 U. S. 495; 81 L. ed. 1245; 57 S. Ct. 868	12, 15, 28
Chapman & Dewey Lord Company v. Bigelow, 206 U. S. 41; 51 L. ed. 953; 27 S. Ct. 679	40
Cochran v. Louisiana State Board of Education, 281 U. S. 370; 74 L. ed. 913; 50 S. Ct. 335	15, 26, 28, 37
Collins v. Johnston, 237 U. S. 502	41
Commonwealth v. Board of Education of Methodist Episcopal Church, 167 Ky. 619; 179 S. W. 576	37
Doremus v. Board of Education, 342 U. S. 429; 96 L. ed. 475; 72 S. Ct. 394	14, 18, 19, 20
Everson v. Board of Education, 330 U. S. 1; 91 L. ed. 711; 67 S. Ct. 504	14, 15, 16, 25, 26, 28, 29, 37
Franklin Street Society v. Manchester, 70 N. H. 342	31
Garrett Biblical Institute v. Elmhurst State Bank, 331 Ill. 308; 163 N.E. 1	34
Heisey v. County of Alameda, 46 A.C. 648; 298 P. 2d 1	3, 6, 39
Holy Trinity Church v. United States, 143 U. S. 457; 36 L. ed. 226; 12 S. Ct. 511	25

Pages

Lisenba v. California, 314 U. S. 219; 86 L. ed. 166; 62 S. Ct. 280 41
Los Angeles Farming and Milling Company v. Los Angeles, 217 U. S. 217; 54 L. ed. 736; 30 S. Ct. 452 40
Lundberg (Heisey) v. County of Alameda, 46 A. C. 648; 298 P. 2d 1 ..... 3, 6, 39

Massachusetts v. Mellon, 262 U. S. 447 18
Metropolitan Street Railway Co. v. New York State Board of Tax Commissioners, 199 U. S. 1, 50 L. ed. 65, 25 S. Ct. 705 21

Neblett v. Carpenter, 305 U. S. 297; 83 L. ed. 182; 59 S. Ct. 170 41

Pierce v. Society of Sisters, 268 U. S. 519; 69 L. ed. 1070, 45 S. Ct. 71 ..... 26, 27
Public Service Commission v. Wycoff Co., 344 U. S. 237 23

Ruff v. Teets, 235 F. 2d 674 41

State v. Collector of Jersey City, 24 N. J. Law 108 ..... 31, 32

Tilley v. County of Cook, 143 U. S. (Otto) 155 11
Trustees of Griswold College v. State of Iowa, 46 Iowa 275 34
Trustees of Kentucky Female Orphan School v. City of Louisville, 100 Ky. 470; 36 S. W. 921 34
Trustees of Methodist Episcopal Church v. City of Atlanta, 76 Ga. 181 34

United Public Workers v. Mitchell, 330 U. S. 75 23
United States ex rel Darcey v. Handy, 224 F. 2d 504 41

Williams v. Baltimore, 289 U. S. 36 21
Williams v. Riley, 280 U. S. 78; 74 L. ed. 175; 50 S. Ct. 63 19

Zorach v. Clauson, 343 U. S. 306; 96 L. ed. 954; 76 S. Ct. 679 25

Constitutional and Statutory Provisions

United States Constitution: Pages

Article III, Sec. 2 18
First Amendment ...3, 6, 13, 14, 16, 25, 30, 32, 33, 35, 37, 38, 39
Fourteenth Amendment 3, 6, 13, 16, 37, 38, 41

Ordinance for the Government of the Northwest Territory .. 24

California Constitution:
Article XIII, Sec. 1c 4, 5, 7

Education Code, Sec. 16601 12

Education Code, Sec. 16624 12

Government Code, Secs. 29040; 29060; 29061; 29070; 29071; 29091; 29120 23

Revenue and Taxation Code, Sec. 214 4

Other States:

Delaware, Constitution of 1792, Sec. 1 of Article I 33

Georgia, Constitution of 1798, Sec. 10 of Article IV 33

Kentucky, Constitution of 1799, Sec. 3 of Article X 33

Maryland, Constituiton of 1802, Article XXXIII 33

Massachusetts, Constitution of 1780, Article III 33

New Hampshire, Constitution of 1792, Article VI 33

New Jersey, Constitution of 1776, Article XVIII 33

New York, Constitution of 1777, Article XXXV 33

North Carolina, Constitution of 1776, Article XXXIV 33

Pennsylvania, Constitution of 1790, Article III 33

Tennessee, Constitution of 1796, Sec. III of Article XI 33

Vermont, Constitution of 1793, Article III 33

Virginia, Bill for Religious Liberty:
Statutes of (Hening) 1823 34
Statutes at Large, Shepherd's Cont. of Hening, pp. 149, 200 34

Texts and Other References

Page

Adler, Historical Origin of the Exemption from Taxation of Educational Institutions, etc. (1922), p. 74 31

American Juris. (Public Funds), Vol. 42, Sec. 56, p. 757 27

Conrad, Constitutions of the United States (1804) 33

Cooley, Constitutional Limitations, pp. 470, 471 35

Story, Commentaries on the Constitution, Vol. 8, Sec. 1868, p. 726 24

Torpey, Judicial Doctrines of Religious Rights in America (1948), p. 173 32

Zollman, American Church Law (1933), pp. 329-30 32

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956

No. 473

PAUL W. HEISEY,

Appellant,

vs.

COUNTY OF ALAMEDA; CITY OF OAKLAND; RUSSELL C. HORSTMANN, as County Assessor of Alameda County; ROGER COIT, as County Treasurer of Alameda County; EDWIN MEESE, JR., as County Tax Collector of Alameda County; CHESTER STANLEY, as Chairman of the Board of Supervisors of Alameda County; CLIFFORD RISHELL, as Mayor of the City of Oakland; THE ROMAN CATHOLIC WELFARE CORPORATION OF SAN FRANCISCO, Intervenor,

Appellees.

MOTION TO DISMISS APPEAL.

To Paul W. Heisey, Appellant in the Above Entitled Cause, and to Henry C. Clausen, His Attorney:

The Roman Catholic Welfare Corporation of San Francisco, a (California) corporation, intervenor-appellee in the above entitled cause, moves the Court to dismiss, with costs, the appeal of appellant Paul W. Heisey from the judgment of the Supreme Court of the State of California, in said cause, upon the grounds that said appeal (1) does not present a judiciable case or controversy within the jurisdiction of the Court, and (2) does not present a substantial Federal question.

Dated, San Francisco, California,
October 23, 1956.

ANDREW F. BURKE,
Attorney for The Roman Catholic Welfare Corporation of San Francisco, a (California) corporation, Intervenor-Appellee.

BRIEF IN SUPPORT OF MOTION.

I. NATURE OF CAUSE.

The appeal herein is from a final judgment of the Supreme Court of California (46 A. C. 648; 298 P. 2d 1) which upheld the constitutional validity of a state statute which granted tax exemption to *private, non profit* "schools of less than collegiate grade." It is contended by the appellant that, insofar as the exemption applies to schools (of the character mentioned) *in which religion is taught,* the statute granting it constitutes an "establishment of religion" contrary to the First Amendment to the Federal Constitution, the provisions of which are claimed to be incorporated in the due process clause of the Fourteenth Amendment. In addition, appellant contends that the statute violates his rights under the "due process" and "equal protection" provisions of the Fourteenth Amendment, in various ways, hereinafter discussed.

The appellant was not a party to the action in the trial Court. He was brought into the action as an *additional* party plaintiff by *ex parte* order made after the death of the *original* plaintiff, which occurred after the judgment of the Supreme Court of California had been rendered.

II. STATEMENT OF FACTS.

At the general election of November 7, 1944, the electors of California approved an amendment to the

State Constitution (numbered Section 1c of Article XIII) which authorized the legislature to "exempt from taxation all or any portion of the property used exclusively for religious, hospital, or charitable purposes and owned by . . . corporations organized and operated for religious, hospital or charitable purposes, not conducted for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual." This constitutional provision will be, hereinafter, called the "Enabling Act."

To carry out the provisions of the Enabling Act, the Legislature of California, at its 1945 session, enacted Section 214, Revenue and Taxation Code, by which it granted tax exemption to hospitals and various other types of institutions. However, the section expressly provided that the granted exemption should not enlarge the *college* exemption (theretofore granted by the State Constitution), nor grant exemption to "schools of less than collegiate grade". At its 1951 session, the Legislature amended said Section 214 by striking from it the provision that the exemption should *not* apply to "schools of less than collegiate grade", and by adding to it a provision that the exemption should include the property of *private, non profit* "schools of less than collegiate grade". It is this latter provision which gives rise to the present controversy. As amended, the pertinent portion of the code section reads as follows:

> "Property used exclusively for *school purposes of less than collegiate grade* and owned and operated by religious, hospital or charitable funds,

foundations or corporations which property and funds, foundations or corporations meet all of the requirements of this section, shall be deemed to be within the exemption provided for in Section 1c of Article XIII of the Constitution of the State of California and this Section."

(The "requirements" of the *private, non profit* character of the exempted schools are set up on other portions of the Code Section, which, in its entirety, is set forth on pages 3-5 of Appellant's "Statement as to Jurisdiction.")

After its adoption by the Legislature, the amended statute was submitted to the electors on referendum and was approved by them. Thereupon, one Alfred J. Lundberg commenced a suit in the Superior Court of the State of California, in and for the County of Alameda, against said County, the City of Oakland therein, and certain officers of the County and the City, to enjoin the defendants from granting tax exemption to *any* schools of the character mentioned in the statute. The suit purported to be a representative or class suit. The complaint alleged that it was brought by the plaintiff as a citizen, resident and taxpayer of the defendant County and defendant City, not only on his own behalf but, also, on behalf of all other citizens, residents and taxpayers in said County and said City. The complaint alleged (and the plaintiff contended) that the statutory grant of exemption to "schools" was unconstitutional as against *all* schools affected by it, upon the grounds that the Enabling Act (1) did not authorize the Legislature to

grant exemption to *any* "schools", and (2) violated various provisions of the California Constitution.

As applied to schools in which religion is taught, the plaintiff alleged and contended that the challenged statute was unconstitutional for the additional reason that it violated the "establishment of religion" clause of the First Amendment to the Federal Constitution which he claimed to be applicable to the states under the Fourteenth Amendment, and that it otherwise violated his rights under the "due process" and "equal protection" provisions of the Fourteenth Amendment.

The intervenor appellee, which is the owner and operator of schools of the character mentioned in the challenged statute, by leave of court, intervened in the suit, on the side of the defendants, and, by its counsel, participated in the trial of the suit and in all subsequent proceedings therein.

A three judge court tried the suit. Two of the three judges awarded judgment to plaintiff, upon the *California* constitutional grounds urged by him, ***but declined to pass upon the Federal questions raised against schools which teach religion.*** The third judge found against the plaintiff on both the California and the Federal questions. On motion of the plaintiff, the majority Judges struck from the files the judgment of the dissenting Judge. Upon appeal by the defendants and the intervenor from the judgment of the majority Judges, the Supreme Court of California on June 6, 1956, reversed said judgment. (46 A.C. 648, 298 P.2d 1.)

The Court, also, (on the ground that they had been rendered moot by its decision on the main appeal) dismissed certain subsidiary appeals.[1]

In its judgment, the Supreme Court of California held (1) that the exemption granted by the challenged statute to private non profit "schools of less than collegiate grade was authorized by the above mentioned Enabling Act (i.e., Section 1c of Article XIII); (2) that the statute did *not* violate any of the other provisions of the California Constitution invoked by the plaintiff, *because all of them were controlled by the (later) provisions of the Enabling Act;* and (3) that in so far as it applied to schools which teach *religion,* the challenged statute did not violate the Federal Constitution. A petition for a rehearing followed, and was denied.

On June 14, 1956 (eight days after the decision of the Supreme Court of California was rendered), Mr. Lundberg, the plaintiff in the action died. Later, by *ex parte* orders, pursuant to *ex parte* motions, made in the Superior Court and in the Supreme Court of

[1]These appeals were (1) appeals by the defendants and the intervenor from the order of the majority Judges which had struck from the files, the dissenting judgment of the third Judge, and (2) an appeal by the *plaintiff* from the judgment of the third (i.e., dissenting) Judge. The appeal mentioned in (2) was taken pursuant to Rule 3(b) of the Rules on Appeal of the Supreme Court of California which provides that if a judgment is set aside and an appeal is taken from the order setting it aside, the party against whom said judgment was rendered may appeal from it. Thus, the net result of the order of the Supreme Court dismissing the subsidiary appeals was to leave intact the order of the majority Judges which had stricken the dissenting judgment from the files and to leave the judgment of the majority Judges as the *sole* judgment of the *trial* Court.

California, Paul W. Heisey, the appellant herein, was brought into the suit in both Courts as an *additional* party plaintiff, upon the ground (shown, only, by his *ex parte* affidavit) that he was one of the unnamed and indefinite number of the class for whom the original plaintiff purported to bring the suit as alleged in his complaint. Said Paul W. Heisey is the *only* appellant herein. No personal representative of the original (deceased) plaintiff, Mr. Lundberg, is an appellant.

It was shown upon the trial, that, in accordance with the challenged statute, applications for tax exemption in the fiscal year 1953-54 were duly filed on behalf of *708* private non profit "schools of less than collegiate grade"; that of these *473* were schools conducted under the auspices of the Catholic Church, and that religion was taught in them; that of the remaining *235* schools, many (the exact number not being shown) *were conducted under the auspices of other religious creeds and that religion was taught in them*, and that still others were conducted under non-religious auspices and religion was *not* taught in them. It was further shown that in the *708* schools which had applied for exemption, *232,083* pupils were being educated, of whom *206,023* attended Catholic schools and *26,060* attended the other schools (some *religious*, and some *non-religious*). (We use the terms "religious" and "non-religious", solely, to distinguish between schools which *do* teach religion, and schools which do *not* teach religion).

The evidence also showed that the total amount of taxes paid in the fiscal year 1952-53 (ending June 30, 1953) in respect of *all* schools in California which had applied for tax exemption under the challenged statute was *$1,123,882.88,* and that of this amount *$900,763.11* (80.1%) was paid in respect of the Catholic schools. Thus, it appeared that *if* the tax rate and the assessed valuation of the interested schools would be approximately the same in the succeeding fiscal year 1953-54 (commencing July 1, 1953), in which exemption was claimed, the total tax loss throughout the entire state *if all the claims for exemption were allowed in toto* would be somewhat less than *$1,124,000.00.* (The trial was concluded before the tax rates and assessments for the fiscal year 1953-54 were finally fixed and before the tax officers had passed upon the applications for exemption from the taxes of said fiscal year, and so the record does not show the total amount of the taxes involved in the claims for exemption which were finally *allowed.* It may be fairly assumed, however, that with the *total denial* of some claims for exemption and the *partial denial* of others, the total amount of the taxes lost *throughout the entire state* by reason of the exemptions which were allowed would be less than $1,000,000.00, and in Alameda County would be less than $74,000.00.

It was shown upon the trial by the Assistant Assessor of the defendant Alameda County that the assessed valuation of the property of the original plaintiff, Mr. Lundberg, in Alameda County, for the

fiscal year 1952-53 (in which the trial was had and which ended June 30, 1953) was $12,425.00, and that in respect of said property he had paid in said fiscal year taxes amounting to $905.10. It was, also, shown upon the trial, by said Assistant Assessor, that *if* in the ensuing fiscal year the tax authorities should increase the taxes on *non-exempt* property, to raise the tax moneys lost through the exemption, Mr. Lundberg's total tax increase would amount to *$1.83* only. ***It should be pointed out, however, that there is no evidence in the record of any increase of taxes on non-exempt property as a result of the exemption.***

Inasmuch as Mr. Heisey was not a party to the action in the trial Court and did not become a party to it until after the death of the original plaintiff, and after the rendition of the judgment of the Supreme Court of California, the record is silent with respect to whether or not he paid any taxes to either the City of Oakland or the County of Alameda in *any* fiscal year, or the amount of *any* such taxes, if he ever paid *any*. Of course, the record does not show that the taxes of the appellant were increased as the *direct* (or *any)* result of the exemption. We stress this fact at this time, because, later, we make it the basis of an argument against the jurisdiction of the Court.

It is apparent, of course, that the schools to which the exemption applies, *annually,* save the State of California millions of dollars, *by educating without cost to the State, the more than 232,000 pupils who attend such schools.* In this connection, the intervenor-appellee offered, on the trial, to prove that if

to the number of schools affected by the exemption and the number of pupils educated in them, there should be applied the various integers of cost, used by California *public* school authorities to determine the cost of education, in the *public* schools of the state, it would be found that the exempted schools, in the fiscal year in question, would save the State many times the tax loss resulting from the exemption. This offer of proof was rejected by the trial Court *upon objection by the plaintiff*. Under familiar principles, however, it must be presumed, on appeal, that the matters included in the offer of proof could have been proved, and, consequently, that they must be regarded as proved.

> ("The offer of the plaintiff to prove certain facts having been rejected, he must be presumed to be able to prove what he offered to prove. We must, therefore, assume that the custom which he offered to prove did, in fact, exist." [*Tilley v. County of Cook*, 103 U.S. (Otto) 155, 164].)

On the trial, the plaintiff made no attempt to show the extent to which religion was taught in any of the *religious* schools, other than those conducted under Catholic auspices, and there is no evidence in the record upon that subject in so far as the other religious schools are concerned. With respect to the Catholic schools, it was shown that, in them, approximately *20* minutes per day were devoted to the teaching of the dogmas and tenets of the Catholic Church. It was further shown that said schools maintained a curriculum of *secular* education which measured up to the

State's standards for the *public* schools of the State. This latter requirement had to be met by *all* exempted schools as a condition to receiving the exemption. In fact, no *private* school may operate in California which does not meet this requirement. Section 16,601 of the Education Code of the State requires *all* children of school age to attend "*public* full time day schools" of the State, unless exempted from the requirement. Children attending *private* schools are exempted from the requirement of Section 16,601 *only* if they, and the schools attended by them, satisfy the requirements of Section 16,624 of the Education Code which reads, in part, as follows:

> "Children who are being instructed in a *private, full-time,* day school by persons capable of teaching shall be exempted. Such school shall be taught in the English language and shall *offer instruction in the several branches of study required to be taught in the public schools of the State.*"

III. QUESTIONS PRESENTED BY THE APPEAL.

As stated in *Carmichael v. Southern Coal Company,* 301 U.S. 495, 507, 81 L.Ed. 1245, 57 S.Ct. 868, (1937) the judgment of the Supreme Court of California has "put to rest" all questions based upon *California* Constitutional or statutory grounds. Because of this fact, the only questions presented by the pending appeal are, *first,* whether in the circumstances disclosed by the record the appellant's claim presents a judiciable "case" or "controversy" within the jurisdiction of the court, and *second,* whether the

exemption granted by the statute *as applied to private non profit "schools of less than collegiate grade" in which religion is taught* violates the "establishment of religion" clause of the First Amendment or the "due process" or "equal protection" provisions of the Fourteenth Amendment.

In the light of the facts disclosed by the record, the questions mentioned may be stated as follows:

1. May a person who claims to be a taxpayer of a county or a municipal corporation of a state assail the constitutionality of a state statute which exempts certain property from taxation, in the absence of a showing that he has sustained or is in immediate danger of sustaining a *direct* injury (in the nature of a money loss) from the operation of the exemption; and

2. Does a statute which, *in order to aid education*, and, thus, to promote the *public* welfare, grants tax exemption to private non profit schools, violate the "establishment of religion" clause of the First Amendment, or the "due process" or "equal protection" provisions of the Fourteenth Amendment, in so far as it applies to schools of the character mentioned, *which are conducted under religious auspices and provide instruction in the dogmas and tenets of a particular religion*, notwithstanding that said schools (like the private non profit schools which do *not* teach religion) meet the State's requirements in all respects, and provide a full curriculum of *secular* education which measures up to the State's standards for the *public* schools of the State?

IV. SUMMARY OF ARGUMENT.

A. None of appellant's contentions presents a judiciable "case" or "controversy" within the jurisdiction of the Court, because the record fails to show that appellant "has sustained" or is in "immediate danger of sustaining" any *direct* injury (in the nature of a money loss) from the operation of the exemption granted by the challenged statute. For this reason appellant's contentions are controlled by the principle asserted and applied by the Court in *Doremus v. Board of Education,* 342 U.S. 429, 96 L.Ed. 475, 72 S.Ct. 394 (1952.)

B. Appellant's contention that the challenged statute offends against the "establishment of religion" clause of the First Amendment does not present a *"substantial"* Federal question for the following reasons :

(1) The "establishment of religion" clause does not justify (much less require) *antagonism* to religion.

(2) There is no merit in appellant's contentions that tax exemption to religious schools is unlawful because said schools are in "competition" with *public* schools, and do not serve a "public" purpose. That *secular* education, *in religious schools,* serves a *public* purpose has been, repeatedly, held by this Court, and it is "much too late" (*Everson v. Board of Education*) to argue to the contrary. Further-

more, any "competition" between religious schools and public schools is the *legitimate* result of the exercise of constitutional rights on the part of the religious schools, and cannot affect their right to the tax exemption granted by the challenged statute.

(3) The challenged statute was enacted for a *public* purpose (i.e., to promote secular education) and the benefits which religious schools derive from its operation are incident to and consequent upon the accomplishment of the "public" purpose and so are lawful, in accordance with the principle enunciated and applied by this Court in *Cochran v. Louisiana State Board of Education,* 281 U. S. 370, 74 L.Ed. 913, 50 S.Ct. 335; *Carmichael v. Southern Coal Co.,* 301 U. S. 495, 81 L.Ed. 1245, 57 S.Ct. 868, *Everson v. Board of Education,* 330 U. S. 1, 91 L.Ed. 711, 67 S.Ct. 504, and other cases.

(4) Tax exemption has been granted to churches, religious schools and other religious organizations in this country from the earliest colonial days; this fact furnishes an historical answer to the contention that the "establishment of religion" clause was intended to prohibit such exemption.

(5) Despite the fact that from Revolutionary days state constitutions have contained provisions similar in form or substance to the

"establishment of religion" clause of the First Amendment or provisions prohibiting aid, through tax moneys, to *sectarian* institutions, or provisions which prohibit compulsory support by a citizen of a church of which he is not a member, it has never been held that a tax exemption granted to such institutions violated any of such provisions. On the contrary, whenever the validity of such an exemption has been questioned, the decision has been in favor of its validity.

(6) There is nothing in the decision or reasoning in *Everson v. Board of Education* which is inconsistent with the views hereinabove expressed.

C. None of appellant's contentions based upon the "due process" and/or "equal protection" provisions of the Fourteenth Amendment presents a *"substantial"* federal question or has any intrinsic merit for the following reasons:

(1) Neither the "due process" provision nor the "equal protection" provision of the Fourteenth Amendment, *considered alone,* imposes any restriction upon the power of a state to grant such tax exemptions as it may deem proper;

(2) There is no merit in appellant's contention (based upon *Brown v. Board of Education,* 347 U.S. 483, 98 L.Ed. 873, 74 S.Ct. 686 (1954)) that the challenged statute lacks

constitutional validity because it fails to make education "available to all on equal terms"; the *Brown* case deals only with the right of citizens to *equal* educational facilities *in public schools* and is inapplicable in the present cause.

(3) There is no merit in appellant's contentions (based upon his assertions that religious schools are in "competition" with public schools and do not serve a "public" purpose) that the exemption of *religious* schools increases his taxes and takes his property for a "non-public" purpose.

(4) Appellant's contentions based upon the California Constitution do *not* present *federal* questions.

(5) Appellant's contentions that the trial Court and the Supreme Court of California erred in refusing the original plaintiff's proffer of evidence regarding religious doctrines taught in the Catholic schools of California, and that the Supreme Court of California erred refusing to make findings in favor of the original plaintiff on the basis of the proffered (but rejected) evidence do not present Federal questions.

V. ARGUMENT.

We respectfully submit (1) that the case attempted to be made by the appellant does not present a judiciable "case" or "controversy" within the jurisdiction of the Court; and (2) that no substantial federal question is presented by the appeal.

A. APPELLANT'S CONTENTIONS DO NOT PRESENT A JUDICIABLE "CASE" OR "CONTROVERSY" WITHIN THE JURISDICTION OF THE COURT, BECAUSE THE RECORD FAILS TO SHOW THAT APPELLANT HAS SUSTAINED OR IS IN IMMEDIATE DANGER OF SUSTAINING ANY DIRECT INJURY (IN THE NATURE OF A MONEY LOSS) FROM THE OPERATION OF THE EXEMPTION GRANTED BY THE CHALLENGED STATUTE.

Under Section 2 of Article III of the Federal Constitution, the judicial power of the Courts of the United States is limited to "cases" or "controversies". Unless then the claim asserted by a litigant presents a "case" or "controversy" it is not judiciable in any Court of the United States. The essentials of a judiciable "case" or "controversy" are clearly set forth in *Doremus v. Board of Education,* 342 U.S. 429, 96 L.Ed. 475, 72 S.Ct. 394 (1952), wherein the Court pointed out that the test of the jurisdiction of a Federal Court in a taxpayer's suit involving the application of tax moneys, is the same when a State statute is involved as when a *Federal statute* is involved. It then approved the jurisdictional test adopted in *Massachusetts v. Mellon,* 262 U.S. 447, wherein the Court, speaking of the invocation by a taxpayer of the

power of a Federal Court to enjoin the enforcement of a tax statute, said (262 U.S. p. 488):

> "The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally."

In *Doremus*, the Court further held that the "direct" injury which a taxpayer must show in order that he may invoke the power of this Court to enjoin an alleged misuse of the taxing power must be a *pecuniary* loss, involving the exaction from the taxpayer of moneys which he would not have had to pay except for the enforcement of the statute of which he complains. In this connection the Court said (342 U.S. 434):

> "The taxpayer's action can meet this test, but only when it is a good-faith pocketbook action. It is apparent that the grievance which it is sought to litigate here is not a direct dollars-and-cents injury but is a religious difference."

In *Williams v. Riley*, 280 U.S. 78, 74 L.ed. 175, 50 S.Ct. 63 (1929), the complainant sought, in a District Court of the United States, to enjoin the enforcement by the defendant (Controller of the State of California), of a state law imposing a gasoline tax. The Court dismissed the bill, whereupon the complainant appealed. This Court affirmed the judgment of the District Court and said (280 U.S. 79):

> "Appellants may not undertake to test the validity of the questioned acts by a proceeding of this character. *Frothingham v. Mellon, Sec'y of the Treasury*, 262 U.S. 447, 487, 488, announces the applicable doctrine.
>
> 'The administration of any statute, likely to produce additional taxation to be imposed upon a vast number of taxpayers, the extent of whose several liability is indefinite and constantly changing is essentially a matter of public and not of individual concern.'
>
> The federal courts have no power *per se* to review and annul acts of state legislatures upon the ground that they conflict with the federal or state constitutions. 'That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act.'"

Except for a recital in the *ex parte* order which brought him into the action as an "additional" plaintiff, there is no evidence in the record to show that appellant is or ever was a resident and taxpayer of the defendant city or defendant county. But more than this, there is no showing of any *direct pecuniary loss* to the appellant resulting from the exemption granted by the challenged statute.

As was the fact in *Doremus* (342 U.S. 429, 433) so is it the fact here that "No information is given as to what kind of taxes are paid by appellant". Again, paraphrasing *Doremus* (p. 433), "there is no averment that the exemption complained of in the present case increased any tax that appellant pays or that as

a taxpayer he is, will, or possibly can be out of pocket because of it".

A grant of exemption, without more, may not be attacked by a taxpayer.

In *Metropolitan Street Railway Co. v. New York State Board of Tax Commissioners*, 199 U.S. 1, 50 L.Ed. 65, 25 S.Ct. 705 it is said (p. 47):

> ". . . there is nothing in the Federal Constitution to prevent a state from granting exemption from taxation." (Citing *Bell's Gap Railroad Co. v. Pennsylvania*, 134 U.S. 232.)

In the case cited, the Court said (134 U.S., p. 237):

> ". . . The provision in the Fourteenth Amendment, that no State shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions."

> "It is not the function of a Court to determine whether the public policy which finds expression in [an exemption from taxation] is well or ill conceived." (*Williams v. Baltimore*, 289 U.S. 36, 42 (1933).)

The appellant has not suffered any direct pecuniary loss through the operation of the exemption, *considered by itself*. It is only upon the theory that the amount of the exempted taxes must, *necessarily*, be made up by *increased* taxes from other taxpayers,

that any claim of a pecuniary loss to appellant could be justified. *But the record contains no averment or evidence of any increase of taxes to the appellant, or anything to show that an increase of taxes has resulted or will result to him from the exemption.* Indeed, it may well be that there will be no need on the part of defendants, County and/or City, to recoup the tax loss resulting from the exemption.

Furthermore, any increase in the appellant's taxes that may occur, *would not result from the granted exemption per se,* but would result entirely from the *independent* action of the taxing authorities of the County of Alameda and the City of Oakland.

As heretofore pointed out, at the time of the trial (June 4, 5, 1953) neither the assessment roll nor the tax rate for the fiscal year 1953-54 (which commenced July 1, 1953) had been adopted by the defendant city or the defendant county. At the time of the trial, it was not known and could not be known what would be the amount of the taxes of any taxpayer in such fiscal year. Thus, there is nothing in the record to show that the taxes of the appellant were increased in said fiscal year as a direct result of the exemption or that they will be increased in the future as a direct result of the exemption. Consequently, there is no evidence in the record to show that the appellant has suffered or will suffer any *direct* pecuniary loss as a result of the exemption.

The amount of taxes levied against a taxpayer is fixed by the application of (1) an assessment roll of taxable values made up by *one* city or county taxing

official (i.e., the *assessor*), to (2) a tax rate set by *other* taxing authorities (i.e., the *City Council* and the *County Board of Supervisors;* respectively) and is dependent upon the ascertainment of the "estimated" revenue from [all] sources, including *new* as well as *old* "sources", and any existing "surplus".[2] Assessment values and tax rates are dependent upon circumstances existing at the time they are adopted and have no *necessary* relation to any exemption granted by the people in their sovereign capacity. Indeed, the tapping of *new* sources of revenue and/or the existence of available "surplus" may make it unnecessary to increase the taxes on *old* sources of revenue.

A claim of injury which may serve as the basis of a "case" or "controversy", must be more than a "possibility". It must be more than a threat implied by the mere existence of laws which, if availed of, might cause injury. In short, the "injury" necessary to a "case" or "controversy" may not be "nebulous" or "contingent". (*Public Service Commission v. Wycoff Co.,* 344 U.S. 237, 244 (1952); *United Public Workers v. Mitchell,* 330 U.S. 75, 91 (1944); *Alabama Federation of Labor v. McAdory,* 325 U.S. 451, 465 (1945).

We submit, therefore, that the appellant failed to show that he has suffered or is "in immediate danger" of suffering any *direct* pecuniary loss, as a result of the operation of the exemption of which he com-

---

[2]The procedure for (1) fixing of the tax budget, (2) the assessment of the various "sources" of revenue, and (3) the fixing of the tax rate, are set forth in Sections 29040, 29060, 29061, 29070, 29071, 29091, and 29120, of the Government Code of California (1952).

plains, and, therefore, his claim that the exemption is invalid, does not present a judiciable "case" or "controversy", of which the Court has jurisdiction.

B. APPELLANT'S CONTENTION BASED UPON THE FIRST AMENDMENT DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

For many reasons, hereinafter stated and discussed, appellant's contention, based upon the First Amendment, fails to present a substantial Federal question.

1. THE "ESTABLISHMENT OF RELIGION" CLAUSE OF THE FIRST AMENDMENT DOES NOT JUSTIFY (MUCH LESS REQUIRE) ANTAGONISM TO RELIGION OR RELIGIOUS INSTITUTIONS.

For from requiring (or even justifying) a spirit of antagonism to religion on the part of the government the religion clauses of the First Amendment should be given a benevolent construction, that will reflect a sympathetic view toward religion—that is religion generally as distinguished from a particular sect or faith. In this connection, it is well to keep in mind that the 1787 Ordinance for the Government of the Northwest Territory stated in Article 3 "that *religion,* morality and knowledge [are] necessary to good government and the happiness of mankind" and that in his "Commentaries on the Constitution" (1833) Mr. Justice Story wrote (Vol. 3, sec. 1868, p. 726):

> "Probably at the time of the adoption of the constitution, and of the amendment to it, now under consideration, the general, if not the uni-

> versal, sentiment in America was, that Christianity ought to receive encouragement from the state, so far as was not incompatible with the private rights of conscience, and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation."

The sentiments of the American people have not changed through the years. They have always had a high reverence for religion.

See *Holy Trinity Church v. United States,* 143 U.S. 457, 465, 36 L.Ed. 226, 12 S.Ct. 511 (1892) and *Zorach v. Clauson,* 343 U.S. 306, 313, 96 L.Ed. 954, 76 S.Ct. 679 (1952).

In *Everson v. Board of Education,* 330 U.S. 1, 91 L.Ed. 711; 67 S.Ct. 504 (1947), the Court said (330 U.S. p. 18) that it was "not the purpose of the First Amendment" to make it "more difficult for [religious] schools to operate", and continued as follows:

> "The Amendment requires the state to be a *neutral* in its relations with groups of religious believers and non-believers; *it does not require the state to be their adversary.* State power is no more to be used so as to handicap religions than it is to favor them."

The atmosphere in which the religion clauses of the First Amendment were considered and adopted, as stated above, and the reverence of our people for religion, as shown through the years and as recog-

nized by this Court, forbid that these clauses be considered to reflect an antagonism between government and religion.

2. THE SO-CALLED RELIGIOUS SCHOOLS SERVE A PUBLIC PURPOSE AND PROMOTE THE "PUBLIC WELFARE".

In his argument contained in the "Statement as to Jurisdiction" counsel for appellant asserts (p. 24) that *private* schools in which religion is taught, do not serve a "public" purpose, notwithstanding that they provide a full curriculum of *secular* education which measures up to the state's requirements for its public schools. This assertion obviously ignores the fact that this Court in *Pierce v. Society of Sisters,* 268 U.S. 510, 69 L.Ed. 1070, 45 S.Ct. 71, has put this matter beyond the realm of controversy, and that this Court in *Cochran v. Board of Education,* 281 U.S. 370, 74 L.Ed. 913, 50 S.Ct. 335 (1930) and *Everson v. Board of Education, supra* held that the schools involved in these cases (which were religious schools) were promoting the "public welfare" by providing a secular education for their students. It is rather late in the day, therefore, to assert or argue that such schools do *not* promote the "public welfare". In fact, this Court in *Everson* (330 U.S., p. 7) said that "it is *much too late*" to so argue. Appellant, also, (pp. 24, 27, 36, 38 of "Statement as to Jurisdiction") argues that tax exemption may not be granted to religious schools because they are in "competition" with the *public* schools. This argument overlooks the fact that religious schools have a constitutional right to exist and to educate students in religious dogma as well

as in secular matters. (*Pierce v. Society of Sisters, supra.)* From this it follows that any alleged "competition" between them and public schools is merely the *legitimate* result of the exercise of a constitutional right.

3. **THE CHALLENGED STATUTE WAS ENACTED FOR THE PUBLIC PURPOSE OF AIDING EDUCATION, AND, THUS, PROMOTING THE GENERAL WELFARE; THE BENEFIT WHICH THE PRIVATE SCHOOLS WHICH TEACH RELIGION (IN COMMON WITH PRIVATE SCHOOLS WHICH DO NOT TEACH RELIGION) DERIVE FROM ITS OPERATION IS AN INCIDENTAL AND CONSEQUENTIAL BENEFIT, ONLY, WHICH DOES NOT BRING IT WITHIN THE PROHIBITION OF THE "ESTABLISHMENT OF RELIGION" CLAUSE OF THE FIRST AMENDMENT.**

In 42 *Am. Jur.* ("Public Funds"), it is said, Sec. 56 (p. 757):

> "When a public purpose can be carried out or helped by spending public money, *the power of the legislature is not curtailed or destroyed by the fact that the money is paid to private persons who had no previous claim to it of any kind."*
>
> (Citing *Carmichael v. Southern Coal Company,* 301 U.S. 495, 81 L.Ed. 1245, 57 S.Ct. 868, with which we deal later.)

Later in the text it is said (p. 758):

> ". . . *It is the essential character of the direct object of the expenditure which must determine its validity,* and not the magnitude of the interests to be affected, or the degree to which the general advantage of the community, and thus the public welfare, may be ultimately benefited by their promotion."

In *Carmichael v. Southern Coal Company,* 301 U.S. 495, 81 L.Ed. 1245, 57 S.Ct. 868, this Court, after pointing out that a state had almost plenary power with respect to what property it should tax and what property it should exempt from taxation, pointed out that the Court had "often sustained the exemption of charitable institutions". (Citing *Bell's Gap R. Co. v. Pennsylvania,* 134 U.S. at 237; *Board of Education v. Illinois,* 203 U.S. 553, 563.) Further, in its opinion, the Court said (p. 518):

> *"If the purpose is legitimate because public, it will not be defeated because the execution of it involves payments to individuals. Kelly v. Pittsburgh,* supra; *Knights v. Jackson,* 260 U.S. 12, 15; cf. *Mountain Timber Co. v. Washington,* 243 U.S. 219, 239-240. 'Individual interests are aided only as the common interest is safeguarded.' See *Cochran v. Board of Education,* 281 U.S. 370, 375; cf. *Clark v. Nash,* 198 U.S. 361, 367; *Hairston v. Danville & Western Ry. Co.,* 208 U.S. 598, 608; *Noble State Bank v. Haskell,* 219 U.S. 104, 110."

It will have been noted that among the cases cited, in the above quotation, is *Cochran v. Board of Education,* in which the Court upheld the constitutionality of a statute of the State of Louisiana, which granted free text books to pupils attending *private* schools, *including schools in which religion was taught.* The *Cochran* case was cited with approval in *Everson* (330 U.S. 7), as justification for the statement that

> "It is much too late to argue that legislation intended to facilitate the opportunity of children

Continuing, the Court in *Everson* said:

> "Nor does it follow that a law has a private rather than a public purpose because it provides that tax-raised funds will be paid to reimburse individuals on account of money spent by them in a way which furthers a public program. See *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 518."

The statute with which we are dealing is within the philosophy and the principle of the cases of this Court from which we have quoted. The purpose of the statute is a *public* one, namely, to promote the public welfare by "facilitating the opportunity of children to get a *secular* education." (*Everson v. Board of Education, supra*). Thus, "the essential character of the *direct* object" of the [legislation] which must determine its validity is wholly *public*. The fact that schools which teach religion, along with schools of the same class which do not teach religion, receive a consequential benefit, through the operation of the statute, does not deprive it of its *public* character or render it invalid.

It should be added that the opinion of the Supreme Court of California in the instant case cites many cases to the point that the fact that *private* persons or institutions derive an incidental or consequential benefit from the operation of a statute enacted for a *public* purpose does not affect the validity of the statute.

4. THE PRINCIPLES MENTIONED ABOVE ARE PARTICULARLY APPLICABLE TO STATUTES WHICH GRANT TAX EXEMPTIONS TO CHURCHES, RELIGIOUS SCHOOLS OR OTHER RELIGIOUS ORGANIZATIONS.

The history of tax exemptions to churches, religious schools and religious organizations generally, particularly in its relation to the religion provisions of the First Amendment and similar provisions in State Constitutions is potent evidence that such exemptions have never been regarded as unlawful aids to religion.

(a) Tax exemption was granted to churches and religious schools by the colonies, and by certain states prior to the adoption of the First Amendment, and has been granted by other states and by the Federal Government since shortly after the adoption of the First Amendment and has always been recognized as a legitimate and proper exercise of legislative power. Therefore, (in the absence of specific language evidencing a contrary intent—and there is none such) a tax exemption should not be considered as being within the philosophy or purpose of the prohibition of laws "respecting an establishment of religion" contained in the First Amendment.

In its opinion in the instant case the Supreme Court of California said (298 P.2d 1, at p. 7):

> "The practice of granting tax exemptions benefiting religious sects began in the colonial period. See Paulsen, Preferment of Religious Institutions in Tax and Labor Legislation (1949), 14 Law & Contemp. Prob. 144, 147-148; Torpey, Judicial Doctrines of Religious Rights in America (1948), ch. VI, pp. 171-174, Zollman, Tax Exemptions of American Church Property (1916) 14 Mich. L. Rev. 646, 647-650. Today, at least some tax exemption for religious groups is authorized by statutory or constitutional provisions *in every*

state and the District of Columbia, as well as by federal law. See Note (1949) 49 Columb. L. Rev. 968, 969-982."

Indeed, tax exemption for religious institutions has always existed in America. In the days of religious establishments in our country not only was the established church exempt from taxes, but the tax exemption was supplemented by tax assessments for religious purposes and for the support of the clergy. And despite the "disestablishment" of the churches after the War of Independence tax exemption to churches and religious institutions has continued to exist.

See:

Franklin Street Society v. Manchester, 60 N.H. 342, 347-8 (1880). *Adler, Historical Origin of the Exemption from Taxation of Charitable Institutions, etc.* (1922) at p. 74.

Tax exemption existed even in the absence of formal constitutional or statutory provisions authorizing it.

As pointed out in *State v. Collector of Jersey City,* 24 N. J. Law 108, 120 (1853):

"Meeting houses and school houses, *although not formally exempted by the tax laws in force prior to 1851* were seldom if ever assessed in any part of the state."

In fact, as just indicated, the first formal exemption of religious institutions in New Jersey, was made by statute in 1851. Massachusetts which always allowed exemption, provided no *constitutional* or *statutory* authority for exemption until 1837, nor did New

Hampshire until 1842 (*Zollman, American Church Law,* 1933, pp. 329-30.)

As said in *State v. Collector of Jersey City, supra,* p. 120, *it was "so entirely in accord with the public sentiment, that it universally prevailed."*

At the present time in more than two-thirds of the states the exemption is provided by self-executing constitutional provisions (*Torpey, Judicial Doctrines of Religious Rights in America* [1948] at p. 173). In other states, the tax exemption is provided by statutes enacted pursuant to constitutional authority.

If ever history afforded a basis for the proper construction of a statute or constitutional provision, the centuries old history of tax exemptions to churches, religious schools and religious organizations in our country furnishes such a construction for the "establishment of religion" clause of the First Amendment and demonstrates that it was never intended that tax exemption to churches or religious institutions should be within its ban.

(b) Exemptions from taxes have never been regarded as grants of public property, within the operation of state constitutional provisions, similar in form or substance to the "establishment of religion" clause of the First Amendment or state constitutional provisions, which prohibit grants of public property to sectarian organizations or for sectarian purposes nor as compulsory "support" by citizens of churches of which they were not members, contrary to constitutional provisions prohibiting such compulsory support.

After the Declaration of Independence, most of the colonies or states adopted *constitutional* provisions

similar in form or substance to the religion clause of the First Amendment. (See the Constitutions of the United States,—John Conrad and Co., Philadelphia, 1804.) Some of these Constitutions, in addition, contained provisions which expressly prohibited the compulsion of a citizen to pay for the "support" of a church of which he was not a member. See, for example, Art. VI of New Hampshire's Constitution of 1792 (Conrad, p. 2); Art. III of Massachusett's Constitution of 1780 (Conrad, p. 34); Art XXXV of New York Constitution of 1777 (Conrad, p. 98); Art. XVIII of New Jersey's Constitution of 1776 (Conrad, p. 107); Art. III of Pennsylvania's Constitution of 1790 (Conrad, p. 120); Sec. 1 of Art. I of Delaware's Constitution of 1792 (Conrad, p. 127); Art XXXIII of Maryland's Constitution of 1802 (Conrad, pp. 153-4); Art. XXXIV of North Carolina's Constitution of 1776 (Conrad, p. 190); Sec. 10 of Art. IV of Georgia's Constitution of 1798 (Conrad, p. 223); Art. III of Vermont's Constitution of 1793 (Conrad, p. 227); Sec. III of Art. XI of Tennessee's Constitution of 1796 (Conrad, p. 255); Sec. 3 of Art. X of Kentucky's Constitution of 1799 (Conrad, p. 310.)

As new states came into the Union may of them adopted similar constitutional provisions while others adopted provisions which prohibited *grants* of *aid* or of public property to *sectarian* organizations or for *sectarian* purposes. *Yet it has never been held that tax exemptions granted to either a church, a religious school or any other religious organization, offended against any of these state constitutional provisions.*

Virginia was in the van of the colonies which struck down religious establishments. It commenced with its "Bill for Religious Liberty", adopted in 1785 (12 Hening-Stats. of Virginia, 1823) and followed in 1799 by repealing a long list of earlier acts which retained vestiges of establishment (Va. Stats. at Large Shepherds Cont. of Hening, 149). Yet, in 1800, Virginia enacted a statute which granted complete tax exemption to all property of "houses for religious worship or seminaries of learning". (p. 200.)

The cases in which it has been contended that a tax exemption to a religious institution violated constitutional provisions prohibiting an "establishment of religion" or "support" of a church or aid to a *sectarian* institution or for a *sectarian* purpose, fortunately, are few. In the face of the universal practice, from the earliest times, of granting tax exemptions to churches and other religious institutions, few litigants have seen fit to assail the validity of such exemptions. In the few cases in which it has been contended that they are invalid, the decisions of the Courts have upheld them.

See: *Garrett Biblical Institute v. Elmhurst State Bank,* 331 Ill. 308, 163 N. E. 1 (1928). *Trustees of Griswold College v. State of Iowa,* 46 Iowa 275 (1877). *Trustees of the Methodist Episcopal Church v. City of Atlanta,* 76 Ga. 181 (1886). *Baltimore City v. Minister and Trustees of Starr Methodist Protestant Church,* 106 Md. 281, 67 A. 261 (1907). *Trustees of Kentucky Female Orphan School v. City of Louisville,* 100 Ky. 470, 36 S.W. 921 (1896).

To the above cases there should be added, of course, the decision of the Supreme Court of California in the instant case. And see, Cooley's Constitutional Limitations pp. 470, 471.

Even judges who have denied the right of religious schools to share "public benefits" recognized the fact that tax exemptions are in a class apart.[3]

In the "Statement as to Jurisdiction" counsel for appellant contends (pp. 18, 30, 32) that a tax exemption granted to a *religious* school has the effect of compelling "appellants and others similarly situated" to support a church to which they do not belong and thus violates the "establishment clause" of the First Amendment. However, at the outset of the discussion of the present point, we noted that the constitutions of many states *existing at the time of the adoption of the First Amendment* contained provisions *which expressly forbade forced support of a church by a citizen who is not a member of it.* And yet, despite such provisions, these states have always granted tax exemption to churches and religious

[3]In *Board of Education of Baltimore County v. Wheat*, 174 Md. 314, 199 A. 628 (Ct. of App., 1938) the majority of the Court upheld the validity of a statute authorizing the transportation, at public expense, of children attending private (including parochial) schools. Three judges dissented. However, the dissenting judges made the following observation (199 A. 642):

> "While the point is made, the exemption of certain property of churches and religious societies from the burden of taxation is not relevant to the questions on this record. *The exemption is firmly established and is in recognition of the importance of religion to the public welfare. Furthermore, the exemption, in final analysis, takes nothing from the funds which have been raised by taxation and is made uniform so that similar property of all sects and denominations is embraced.*"

schools and other religious organizations and have, thereby, affirmed that tax exemptions do not constitute a prohibited "support". Here, again, history effectively points the answer to counsel's argument.

(c) If we assume that a tax exemption granted to religious schools, if made for the primary purpose of aiding religion would violate the "establishment of religion" clause of the First Amendment, such result cannot properly be claimed for the tax exemption granted by the challenged statute, to religious schools, because the primary purpose of the exemption (which is granted to religious and non-religious schools alike) is not to aid religion but rather to aid secular education and, thus, to promote the "general welfare".

In its opinion in the instant case the Supreme Court of California said (298 P.2d 1, at p. 7):

> "it is apparent that the exemption was enacted *to promote the general welfare through encouraging the education of the young and not to favor religion, since it is not limited to schools maintained by religious groups but applies also to those operated by other charitable organizations.* Under the circumstances, any benefit received by religious denominations is merely incidental to the achievement of a public purpose."

It cannot be emphasized too strongly that so-called religious schools are not special or preferred objects of the exemption granted by the challenged statute. In fact, the statute contains no reference to religious schools or schools in which religion is taught. The exemption is a broad one granted to all *private non-profit schools of less than collegiate grade,* which meet the state's requirements in respect of secular education.

> *"There is no such qualifying restriction in the language giving the exemption; it speaks of 'institutions of education'—not of non-sectarian institutions of education."* (*Commonwealth v. Board of Education of Methodist Episcopal Church,* 167 Ky. 619, 179 S.W. 576 (1915).)

As was said of the free text book statute of Louisiana involved in *Cochran v. Board of Education,* 281 U.S. 370, 375 (1930), so it may be said of the challenged statute

> "Its interest is education, *broadly;* its method, comprehensive."

5. THERE IS NOTHING IN EVERSON v. BOARD OF EDUCATION, 330 U.S. 1, WHICH IS INCONSISTENT WITH THE VIEWS EXPRESSED ABOVE.

Not only is there nothing in Everson which is inconsistent with the views expressed above, but on the contrary the decision and the reasoning in Everson are wholly compatible with these views.

C. NONE OF THE APPELLANT'S CONTENTIONS, BASED UPON THE "DUE PROCESS" AND/OR THE "EQUAL PROTECTION" PROVISIONS OF THE FOURTEENTH AMENDMENT PRESENTS A "SUBSTANTIAL" FEDERAL QUESTION, OR POSSESES ANY MERIT.

In addition to claiming that the challenged statute violates the First Amendment to the Federal Constitution through the Fourteenth Amendment, appellant contends that the statute violates his rights under the "due process" and "equal protection" provisions of the Fourteenth Amendment. None of these conten-

tions presents a "substantial" Federal question, or has merit.

1. NEITHER THE "DUE PROCESS" NOR THE "EQUAL PROTECTION" PROVISIONS OF THE FOURTEENTH AMENDMENT, CONSIDERED ALONE, IMPOSES ANY RESTRICTION UPON THE POWER OF A STATE TO GRANT SUCH TAX EXEMPTIONS AS IT MAY DEEM PROPER.

We do not labor this point because we have already dealt with it somewhat at length in connection with appellant's contentions based upon the First Amendment. (See pages 30-36, *supra.*)

2. THERE IS NO MERIT IN APPELLANT'S VARIOUS CONTENTIONS BY WHICH HE SEEKS TO SHOW THAT THE CHALLENGED STATUTE VIOLATES HIS RIGHTS UNDER THE "EQUAL PROTECTION" AND "DUE PROCESS" PROVISIONS OF THE FOURTEENTH AMENDMENT.

We now deal with the various contentions of appellant based upon the "due process" and "equal protection" provisions of the Fourteenth Amendment and show that there is no merit in any of them.

(a) There is no merit in appellant's contention (based upon Brown v. Board of Education, 347 U.S. 483) that the challenged statute violates the "equal protection" provision of the Fourteenth Amendment, by failing to make education "available to all on equal terms."

At pages 30-33 of the "Statement as to Jurisdiction," appellant, seemingly, argues that *Brown v. Board of Education,* 347 U.S. 483, 98 L.Ed. 873, 74 S.Ct. 686 (1954) is authority for the proposition that anything that a state permits in a *private* school "must be made available to all on equal terms." Based upon this, as his major premise, appel-

lant argues that since religion is taught in some private schools it should be "available to all" *in the public schools,* and since this is not legally possible, it follows that the teaching of religion should be banned in all *private* schools, or, at least in such of them as enjoy tax exemption. In our opinion, the mere statement of appellant's contention serves to answer it. All that the *Brown* case decides is that *all* citizens have a right to "equal" facilities in respect of education *in the public schools of a state.* The principle of the *Brown* case has absolutely no relevancy in the present cause.

(b) There is no merit in appellant's contention (based upon his assertions that religious schools are in "competition" with public schools and do not serve a public purpose), that the exemption of religious schools, increases his taxes and takes his property for a non-public purpose.

What was said in reply to a similar argument by the appellant in connection with his First Amendment contention is applicable here.

(c) Appellant's contention that the challenged statute violates the California Constitution, because it exempts property "without a specific constitutional authorization", raises no federal question, but a state question only, which is foreclosed by the judgment of the Supreme Court of California.

The judgment of the Supreme Court of California holds that the challenged statute *was enacted pursuant to constitutional authority, which rendered inapplicable the constitutional provisions which appellant cites.* (46 A.C. 648, 298 P. 2d 7.) The ruling of the Supreme Court of California is the result of its construction of the *California* Constitution, and does not present a *federal* question.

3. APPELLANT'S CONTENTIONS THAT THE SUPERIOR COURT OF ALAMEDA COUNTY AND THE SUPREME COURT OF CALIFORNIA ERRED IN REJECTING THE ORIGINAL PLAINTIFF'S PROFFER OF EVIDENCE RESPECTING THE RELIGIOUS DOCTRINES TAUGHT IN THE CATHOLIC SCHOOLS OF CALIFORNIA, AND THAT THE SUPREME COURT ERRED IN REFUSING TO MAKE FINDINGS IN FAVOR OF THE ORIGINAL PLAINTIFF ON THE BASIS OF THE REJECTED EVIDENCE DO NOT PRESENT FEDERAL QUESTIONS, BUT STATE QUESTIONS ONLY, BASED UPON RULINGS IN RESPECT OF STATE PRACTICE, AND ARE FORECLOSED BY THE JUDGMENT OF THE SUPREME COURT OF CALIFORNIA.

Matters of state practice, including rulings upon the admissibility of evidence, do not present *federal* questions. On the contrary, they present *state* questions only. And in so far as such questions are involved in the present cause, they are foreclosed by the judgment of the Supreme Court of California. This applies not only to the evidence offered by the original plaintiff, and rejected by the trial Court, and the Supreme Court, but, also, to the refusal of the Supreme Court to make findings in favor of the original plaintiff on the basis of the proffered (but rejected) evidence. To the point that these matters do not present *federal* questions, see *Barrington v. Missouri*, 205 U.S. 483, 51 L.Ed. 890, 27 S.Ct. 582 (1907) and *Chapman & Dewey Land Company v. Bigelow*, 206 U.S. 41, 51 L.Ed. 953, 27 S.Ct. 679 (1907). In the latter case, speaking of a ruling which excluded proffered evidence, the Court said (260 U.S. p. 45):

> "It was . . . properly rejected *and the ruling presented no federal question.*"

See, also, *Los Angeles Farming and Milling Company v. Los Angeles*, 217 U.S. 217, 226, 54 L.Ed. 736,

30 S.Ct. 452 (1910), and *Lisenba v. California,* 314 U.S. 219, 227-8, 86 L.Ed. 166, 62 S.Ct. 280 (1941).

And see, *Neblett v. Carpenter,* 305 U.S. 297, 83 L.ed. 182, 59 S.Ct. 170 (1938), wherein the plaintiff claimed that certain actions of the Insurance Commissioner of California were erroneous because they violated statutes of the state. The State Court held to the contrary (10 Cal.2d 307, 74 P.2d 761). On certiorari, the judgment of the State Court was affirmed.

Speaking of the rulings complained of this Court said (305 U.S. 302):

> "All of these holdings concern matters of state law and amount at most to alleged erroneous constructions of the State's statutes by its own court of last resort. Such decisions would not be a denial of the due process guaranteed by the Fourteenth Amendment. We are, therefore, without jurisdiction to review the state court's decision of any of those questions.
>
> It is argued that the Code unconstitutionally delegates legislative functions to the Commissioner, and that the Supreme Court erred in not so holding. This, again, is a question of state law the decision of which by the State's highest court is binding upon us."

See, also:

Rupp v. Teets, 9 Cir., 235 F.2d 674 (1956), citing

Collins v. Johnston, 237 U.S. 502, 506;

United States ex rel Darcey v. Handy, 3 Cir., 224 F.2d 504, 508 (affirmed 350 U.S. 872, 100 L.ed. ....., 76 S.Ct. .....).

VI. CONCLUSION.

For the foregoing reasons, we respectfully submit that the appeal from the judgment of the Supreme Court of California should be dismissed.

Dated, San Francisco, California,
October 23, 1956.

Respectfully submitted,

ANDREW F. BURKE,

Attorney for The Roman Catholic Welfare Corporation of San Francisco, a (California) corporation, Intervenor-Appellee.

Office - Supreme Court, U.S.
FILED
NOV 14 1956
JOHN T. FEY, Clerk

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956

No. 473

PAUL W. HEISEY,
Appellant,

vs.

COUNTY OF ALAMEDA; CITY OF OAKLAND; RUSSELL C. HORSTMANN, as County Assessor of Alameda County; ROGER COIT, as County Treasurer of Alameda County; EDWIN MEESE, JR., as County Tax Collector of Alameda County; CHESTER STANLEY, as Chairman of the Board of Supervisors of Alameda County; CLIFFORD RISHELL, as Mayor of the City of Oakland; THE ROMAN CATHOLIC WELFARE CORPORATION OF SAN FRANCISCO, Intervenor,
Appellees.

APPELLANT'S BRIEF OPPOSING THE DEFENDANT-APPELLEES' MOTION TO DISMISS.

Appeal from the Supreme Court of the State of California.

HENRY C. CLAUSEN,
315 Montgomery Street, San Francisco 4, California,
Counsel for Appellant.

Subject Index

Page

Introduction 2

Argument 2

I. Appellant Heisey presents vital questions for review under the First and Fourteenth Amendments. Defendants have failed to show the lack of substantiality 2

A. Defendants fail to answer appellant's contention that forced tax support for and use of the tax system to promote sectarian education through exemption subsidies presents a substantial question under the First Amendment 2

1. The fallacious argument that our colonial history of religious school exemptions makes such subsidies constitutional 2

2. The fallacious argument that sectarian school exemption subsidies are universal today and that this supposed universality makes such subsidies constitutional 5

3. The erroneous contention that exemption subsidies can be equated with neutrality toward religious schools and therefore do not constitute a direct and substantial aid to sectarian education 8

B. Defendants likewise fail to answer appellant's contention that the forced exemption subsidies also present substantial questions under the equal protection and due process clauses 10

II. Defendants have failed completely to demonstrate that appellant has no standing to sue 11

Conclusion 13

Table of Authorities Cited

Cases Page

American Committee of Rabinical College v. Board of Tax Appeals, 76 N.E. 2d 719 7

Berghorn v. Reorganized School District No. 8, 260 S.W. 2d 573 (Mo., 1953) 4

Bloch v. Board of Tax Appeals, 114 Ohio St. 414, 59 N.E. 2d 145 7

Brainard v. Town of Colchester, 31 Conn. 407 8

Commonwealth v. Thomas, 119 Ky. 208, 83 S.W. 572 12

Eyers Woolen Co. v. Town of Gilsum, 24 N.H. 1, 146 Atl. 511 12

Female Academy of the Sacred Heart, 108 Comm. 136, 142 Atl. 678 7

Largent v. Texas, 318 U.S. 418 10

Pomfret School v. Town of Pomfret, 105 Conn. 456, 136 Atl. 88 7

Society of Precious Blood v. Board of Tax Appeals, 77 N.E. 2d 459 7

Stamford Jewish Center, Inc. v. Stamford, 117 Conn. 379, 168 Atl. 5 7

State ex rel. Johnson v. Boyd, 28 N.E. 2d 256 (Ind., 1940) 4

The Franklin Street Society v. Manchester, 60 N.H. 342 3

Visser v. Nooksack Valley School Dist., 33 Wash. 2d 699, 207 P. 2d 198 4

Zellers v. Huff, 55 N.M. 501, 236 P. 2d 949 (1951) 4

Zorach v. Clauson, 343 U.S. 306 8

Constitutions

United States Constitution: Page
Article XIII, Section 1 5
Article IV, Section 30 5

Texts

2 Cooley on Taxation, Section 770 (4th Ed.), 1924, pp. 1598-1601 7

Cubberly, Public Education in the United States, 44-45 2

Hunter, Tax Exemptions—A Subsidy, 8 Tax. Mag. 332, 351 8

Pfeffer, Church, State & Freedom, 106 2

Pope Pius XI in Encyclical Letter of December 31, 1929, On Christian Education of Youth, Four Great Encyclicals, Paulist press, p. 64 8

Ryan and Boland, Catholic Principles of Politics (1952), page 320 9

Simpson, The Exemption of Property from Taxation in the United States, 18 Minn. L. Rev. 411, 416-419 3

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956

No. 473

PAUL W. HEISEY,

Appellant,

vs.

COUNTY OF ALAMEDA; CITY OF OAKLAND; RUSSELL C. HORSTMANN, as County Assessor of Alameda County; ROGER COIT, as County Treasurer of Alameda County; EDWIN MEESE, JR., as County Tax Collector of Alameda County; CHESTER STANLEY, as Chairman of the Board of Supervisors of Alameda County; CLIFFORD RISHELL, as Mayor of the City of Oakland; THE ROMAN CATHOLIC WELFARE CORPORATION OF SAN FRANCISCO, Intervenor,

Appellees.

APPELLANT'S BRIEF OPPOSING THE DEFENDANT-APPELLEES' MOTION TO DISMISS.

Appeal from the Supreme Court of the State of California.

INTRODUCTION.

Almost all of the points raised in defendants' brief were covered in far more detail in intervenor's brief. Since we have prepared a comprehensive answer to these points in our brief in opposition to intervenor-appellee's motion to dismiss, we refer to that brief and confine ourselves here to a few of defendants' most glaringly erroneous statements and arguments.

ARGUMENT.

I. APPELLANT HEISEY PRESENTS VITAL QUESTIONS FOR REVIEW UNDER THE FIRST AND FOURTEENTH AMENDMENTS. DEFENDANTS HAVE FAILED TO SHOW THE LACK OF SUBSTANTIALITY.

A. DEFENDANTS FAIL TO ANSWER APPELLANT'S CONTENTION THAT FORCED TAX SUPPORT FOR AND USE OF THE TAX SYSTEM TO PROMOTE SECTARIAN EDUCATION THROUGH EXEMPTION SUBSIDIES PRESENTS A SUBSTANTIAL QUESTION UNDER THE FIRST AMENDMENT.

1. The fallacious argument that our colonial history of religious school exemptions makes such subsidies constitutional.

Defendants assert that parochial school tax exemptions are constitutional because they existed in the states when the Federal Constitution was adopted.

Defendants forget, however, that church-state unity and even state-supported religious intolerance were also widespread at that time. Pfeffer, *Church, State & Freedom,* 106. "Public" education was then often the complete servant of the state established sect. Cubberly, *Public Education in the United States,* 44-45. Colonial school tax exemptions were therefore merely

an integral part of the whole religious establishment picture. *The Franklin Street Society v. Manchester,* 60 N.H. 342.

In 1789 there were state establishments of religion. There were state taxes for the support of religion. There were state-supported religious schools. And there were tax exemption subsidies for the state-supported religious schools.

This historical "evidence" pertaining to the practices of some *state* governments certainly furnishes no proof that the First Amendment endorsed such practices. To the contrary, the First Amendment was adopted for the very purpose of preventing *Congress* from pursuing such practices at the *Federal* level. And it was not until the historic *Everson* and *McCollum* cases that the power of the "establishment of religion" clause was brought to bear against *state* governments.

The truly "historical" approach, then, would be to see what oppressive European and Colonial *State* practices brought about the adoption of the *Federal* prohibition against "establishment of religion." With such an approach, one would necessarily observe that sectarian educational subsidies were part and parcel of the oppressive practices. Pursuing history further, one would observe that religious establishments gradually began to disappear at the state level—except in some areas of education. And one would then conclude, as does Simpson in *The Exemption of Property from Taxation in the United*

States, 18 Minn. L. Rev. 411, 416-419, that the reason for sectarian school subsidies disappeared with the elimination of religious establishments.

One would observe still further, however, that in later years the advocates of church-state unity have focussed their efforts almost exclusively on the field of education. As Mr. Justice Jackson points out at 330 U.S. 1, 63:

> "Two great drives are constantly in motion to abridge, in the name of education, the complete division of religion and civil authority which our forefathers made. One is to introduce religious education and observances into the public shools. The other, to obtain public funds for the aid and support of various private religious schools."

These comments are borne out by the many recent examples of near-mergers of the public and Roman Catholic school systems. See *Zellers v. Huff,* 55 N.M. 501, 236 P. 2d 949 (1951); *Berghorn v. Reorganized School District No. 8,* 260 S.W. 2d 573 (Mo., 1953); *Wooley v. Spalding,* (Kentucky Ct. of Appeals, Oct., 1956) *State ex rel. Johnson v. Boyd,* 28 N.E. 2d 256 (Ind., 1940); Cf. *Visser v. Nooksack Valley School Dist.,* 33 Wash. 2d 699, 207 P. 2d 198.

History, then, today finds us armed with the First Amendment as an effective implement to protect against religious establishments at the state level. It also finds us faced with a new and growing "establishment" problem in the field of education. As the Supreme Court of New Mexico stated in *Zellers v. Huff,* supra, 236 P. 2d 954:

> "New Mexico had a Roman Catholic school system supported by public funds within its public school system."

This newly-highlighted form of oppression—arising long after the Federal Constitution was adopted and only after the non-sectarian public school system had become a part of our American way of life—certainly cannot be abrogated by looking to our history of colonial religious establishments for precedent. Instead it must be met by understanding that the history of colonial religious establishments and subsidies gave rise to the very constitutional amendment which today can protect us against a rapidly increasing form of the same tyranny.

2. The fallacious argument that sectarian school exemption subsidies are universal today and that this supposed universality makes such subsidies constitutional.

Defendants also contend that no substantial question has been presented because of the supposed universality of parochial school exemption subsidies in the states today.

The first answer to this so-called "universality" argument is that in California—where the people have long been free to express themselves through the initiative and referendum processes—such exemption subsidies were repeatedly rejected until the invalid legislative assumption of power in 1951. Parochial school tax exemption subsidies have always been clearly prohibited by the California Constitution under the provisions of Article XIII, Sec. 1, and Article IV, Sec. 30. Its courts and taxing authorities had so ruled

prior to this case. And proposed *constitutional* amendments allowing such exemption subsidies were *resoundingly defeated* by the California electorate in the elections of 1926[1] and 1933.[2] Thus in California, the tyrannical burden of forced tax exemption subsidies for sectarian schools has long been understood and uniformly rejected by the people. The 1952 referendum presented a far different problem. At that time, a *legislative* referendum on the 1951 Revenue and Taxation Code Amendment was presented to the people under the omnibus "religious, hospital or charitable purposes" category. Posters and advertisements circulated throughout the state depicted *crippled children* beseeching the voters—"Don't tax our schools." This despite the fact that 88% of the affected children were Roman Catholic school children. Even under such circumstances, however, the referendum squeaked through with a margain of only 77,477 out of a total 4,804,533 votes cast. And it can still be said that *never* have the people of this state adopted a constitutional amendment expressly authorizing tax exemption subsidies for private, undercollegiate schools of any kind.

The second answer to the "universality" argument is that tax exemption subsidies for religious schools are neither universal nor uniform in other states to-

---

[1]The proposed constitutional amendment appeared on the 1926 ballot as Proposition No. 11 and was defeated by a vote of two to one.

[2]The proposed constitutional amendment appeared on the 1933 ballot as Proposition No. 4 and was defeated by a vote of eight to five.

day. In fifteen states, there are express limitations on the acreage or dollar value of school property that may be exempted.[3] In many states, there are explicit requirements that the schools be open to all the public on an equal basis.[4] In others, there are provisions for state supervision of curriculum and teachers' credentials.[5] In still others, there are requirements that tuition be free,[6] that the institution be incorporated in the exempting state,[7] and that the institution meet certain educational specifications.[8] In Connecticut, it was long held that such schools served no public purpose whatever and, therefore, were not entitled to an exemption.[9] And these are only a few of the limitations found in the various states. See 2 *Cooley on Taxation,* Sec. 770 (4th Ed.), 1924, pp. 1598-1601.

The final answer is—and defendants concede this to be true—that such parochial school exemption subsidies have almost never been challenged in the courts. One undoubted reason is that forced public aid

---

[3]Alabama, Indiana, Iowa, Kansas, Maine, Maryland, Mississippi, New Hampshire, New Jersey, Oklahoma, Rhode Island, South Carolina, Washington, West Virginia, and Wisconsin.

[4]E.g., Georgia; Ohio (*Bloch v. Board of Tax Appeals,* 114 Ohio St. 414, 59 N.E. 2d 145, *Society of Precious Blood v. Board of Tax Appeals,* 77 N.E. 2d 459, *American Committee of Rabinical College v. Board of Tax Appeals,* 76 N.E. 2d 719); Texas; and Washington.

[5]E.g., New Hampshire.

[6]E.g., Delaware.

[7]E.g., Michigan, New Jersey.

[8]E.g., Colorado, Virginia, and Wisconsin.

[9]*Stamford Jewish Center, Inc. v. Stamford,* 117 Conn. 379, 168 Atl. 5; *Female Academy of the Sacred Heart,* 108 Conn. 136, 142 Atl. 678; *Pomfret School v. Town of Pomfret,* 105 Conn. 456, 136 Atl. 88.

through tax exemption is an easily obscured, seldom observed, and deceptive form of subsidy. *Brainard v. Town of Colchester,* 31 Conn. 407, 410.

3. The erroneous contention that exemption subsidies can be equated with neutrality toward religious schools and therefore do not constitute a direct and substantial aid to sectarian education.

Defendants confuse the issue still further by pointing to the declaration of this court in *Zorach v. Clauson,* 343 U.S. 306, 314, that the First Amendment does not require "hostility" to religion. Defendants assert that the abolition of religious school subsidies would constitute hostility and urge that neutrality is all that is required.

We agree that neutrality is the test. But this neutrality means *neutrality,* not something less, just as separation means *separation,* not something less.

We cannot agree that the granting of an annual tax exemption subsidy of almost one million dollars to Roman Catholic parochial schools—or to any religious schools—constitutes neutrality. It is a substantial subsidy. Hunter, *Tax Exemptions—A Subsidy,* 8 Tax. Mag. 332, 351. It is a form of direct state aid for sectarian education devoutly sought after by the Roman Catholic Hierarchy. The Roman Pontiff himself declares that more than neutrality is desired—in fact required. In Encyclical Letter of December 31, 1929, *On Christian Education of Youth, Four Great Encyclicals,* Paulist Press, p. 64, Pope Pius XI states that "distributive justice *requires" aid* for education *in Catholic schools from public funds.* Moreover, the

Roman Catholic Hierarchy think of this aid as a special *privilege* which they would deny to other sects where they are in the ascendancy in a particular state. In Ryan and Boland, *Catholic Principles of Politics* (1952), page 320 the authors declare in this basic text for Roman Catholic Colleges:

> "[W]hat then would be the proper course of action for a Catholic State? Apparently, the latter State could logically tolerate only such religious activities as were confined to the members of the dissenting group. It could not permit them to carry on general propaganda nor accord their organization certain *privileges* that had formerly been extended to all religious corporations, *for example, exemption from taxation.*" (emphasis ours)

When we talk of tax exemption for sectarian schools we are therefore in no sense talking about state neutrality. We are talking about state *aid.* We are talking about a *privilege.* And in California, we are talking about a million dollar annual *subsidy.* Whatever characterization of exemptions is used, we can safely say that non-exempt taxpayers will be compelled to *bear an added tax burden and acquiesce in state promotion of private sectarian schools.* Even the majority opinion of the California Supreme Court talks of *promotion* of education, and *benefit* for sectarian schools. It does not argue that mere neutrality is involved.

B. DEFENDANTS LIKEWISE FAIL TO ANSWER APPELLANT'S CONTENTION THAT THE FORCED EXEMPTION SUBSIDIES ALSO PRESENT SUBSTANTIAL QUESTIONS UNDER THE EQUAL PROTECTION AND DUE PROCESS CLAUSES.

Defendants' entire treatment of these points is confined to less than one and one-half pages. (See Defendants' Brief, pp. 8-9.) Our extended discussion of these points in our answer to intervenor's brief should therefore suffice.

We do wish to point out, however, that defendants fail to support their contention that the equal protection and due process questions are not open here. Defendants concede that the Fourteenth Amendment issues were raised in the pleadings. They concede that we argued these points before the California Supreme Court in innumerable briefs, oral argument, and on petition for rehearing. But they rely only on the fact that the majority of the Supreme Court failed to discuss the latter points in their opinion. However, as we point out in our Statement as to Jurisdiction, these points are preserved by reason of having been raised below and having been tacitly rejected when the California Supreme Court upheld that validity of the statute. See *Largent v. Texas,* 318 U.S. 418.

Defendants irresponsibly reject appellant's equal protection and due process arguments.

Appellant Heisey *is* within the class unreasonably discriminated against because he is compelled to support public schools where indoctrination of his sectarian beliefs is forbidden and yet is also forced to support private, sectarian schools where the sectarian

doctrines of *others* are infused into and permeate the entire teaching program.

On the due process point, it is true that five justices of this court rejected the argument that legislation facilitating a private *secular* education serves no public purpose. However, as the evidence in this case shows, and as our reply to intervenor's brief discusses at length, the evidence in this case proves that so-called "secular" education in Roman Catholic schools is forbidden and is a myth.

Defendants attempt to deal with questions 4 and 5 as "state law" questions, but as we point out in our answer to intervenor's brief, the challenged action violates fundamental concepts of ordered liberty and may be challenged under both the due process and equal protection clauses for reasons made clear by the three dissenting justices of the California Supreme Court.

The exclusion of evidence showing a violation of the Federal Constitution is clearly a question which this court may consider as the cases we cite in our reply to intervenor demonstrate. Thus defendants' contention on question 7 is similarly unsupported.

II. DEFENDANTS HAVE FAILED COMPLETELY TO DEMONSTRATE THAT APPELLANT HAS NO STANDING TO SUE.

Defendants' arguments at pages 10 to 13 are no different whatsoever from those of intervenor. We therefore rely on our reply to intervenor's brief to answer the points defendants raise.

We do wish to emphasize three points here, however:

1. It is *clear* from the evidence in this case that many thousands of dollars in taxes will be lost each year by Alameda County alone as the result of parochial school exemptions. This loss of tax revenue is certain. It was proved, AND THE LOSS OF A SOURCE OF TAX REVENUES AMOUNTING TO TENS OF THOUSANDS OF DOLLARS ANNUALLY IS UNQUESTIONABLY A DIRECT POCKETBOOK INJURY.

2. As the courts have stated again and again, it is a matter of common sense that whatever deficit there is in the fiscal budget due the county for any given year by reason of exemptions of property is cast as an additional burden upon the other taxpayers. *Commonwealth v. Thomas,* 119 Ky. 208, 83 S.W. 572, 573; *Eyers Woolen Co. v. Town of Gilsum,* 24 N.H. 1, 146 Atl. 511.

3. In any event, all three trial judges in this case found from the evidence that the taxes lost under the exemption here will be cast upon plaintiff and the other taxpayers of the county and said taxes will thus be borne by plaintiff and these taxpayers.

Thus whether we are talking about a threatened increase in taxes or simply an assured loss of tax revenues, the threatened pecuniary injury to city and county taxpayers is direct, immediate and measurable, and sustains the jurisdiction of this court where such local taxpayers are suing.

Defendants wrongly assert that appellant Heisey's entry into this appeal was by an *ex parte* proceeding and that there was no showing of Heisey's status as an aggrieved taxpayer. We simply refer to Appendices A, B and C attached to our brief in opposition to intervenor's motion to dismiss, and also to appendix D of the statement as to jurisdiction.

CONCLUSION.

For these reasons it is therefore respectfully submitted that the motion of defendants to dismiss should be denied.

Dated, San Francisco, California,
November 13, 1956.

Respectfully submitted,
HENRY C. CLAUSEN,
Counsel for Appellant.

FILED
NOV 13 1956
JOHN T. FEY, Clerk

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956

No. 473

PAUL W. HEISEY,
Appellant,

vs.

COUNTY OF ALAMEDA; CITY OF OAKLAND; RUSSELL C. HORSTMANN, as County Assessor of Alameda County; ROGER COIT, as County Treasurer of Alameda County; EDWIN MEESE, JR., as County Tax Collector of Alameda County; CHESTER STANLEY, as Chairman of the Board of Supervisors of Alameda County; CLIFFORD RISHELL, as Mayor of the City of Oakland; THE ROMAN CATHOLIC WELFARE CORPORATION OF SAN FRANCISCO, Intervenor,
Appellees.

APPELLANT'S BRIEF OPPOSING THE INTERVENOR-APPELLEE'S MOTION TO DISMISS.

Appeal from the Supreme Court of the State of California.

HENRY C. CLAUSEN,
315 Montgomery Street, San Francisco 4, California,
Counsel for Appellant.

Subject Index

Page

Reply to intervenor's purported statement of facts 2

I. Plaintiff Lundberg's showing of his status as a city and county taxpayer; of his representation of city and county taxpayers as a class; and of the threatened direct pecuniary injury to such taxpayers resulting from passage of the statute granting tax exemption subsidies to private and religious schools 2

II. Appellant Heisey's showing of his direct pecuniary injury as a member of the affected class of taxpayers; of his original status as a quasi party; and of the compelling necessity for allowing him to continue the proceedings as an actual party on behalf of all injured taxpayers similarly situated 7

III. The proof that Roman Catholic doctrine is infused into and permeates the entire curriculum and atmosphere in the schools receiving 88% of the tax exemption subsidy. Moreover, the papal decrees and canonical laws urge for the Roman Catholic schools a monopoly on this education 14

IV. Intervenor's erroneous assertion that Roman Catholic undergraduate schools save the state money 16

V. Intervenor's erroneous assumption that Roman Catholic schools perform a public service because they must meet certain minimum statutory educational requirements 21

Reply to intervenor appellee's argument 23

I. Appellant Heisey has shown clearly that he and his class are in immediate danger of sustaining a direct financial injury as taxpayers, and he thus clearly presents a justiciable controversy within the jurisdiction of the United States Supreme Court 23

II. Appellant's showing that the challenged statute grants tax exemption subsidies to, forces public tax support for, and uses the force of the tax system to promote non-public, undercollegiate, sectarian schools clearly

Page

presents a substantial federal question under the Everson and McCollum decisions 30

III. Appellant's showing that the church-school exemption statute forces appellant and other taxpayers who are proscribed from sectarian indoctrination in the public schools to support non-public schools which instruct on these forbidden sectarian matters clearly presents a substantial question within the prohibition of the equal protection clause 36

IV. Appellant's showing that the overwhelming preponderance of tax exemption subsidy here goes to private schools whose whole educational atmosphere is permeated with sectarian dogma clearly presents a case of tax exemption for a non-public purpose within the prohibition of the due process clause of the Fourteenth Amendment 40

V. Appellant also has presented other and substantial federal questions arising under the due process clause. The substantiality is demonstrated by the three-judge dissenting opinion of the California Supreme Court which points out that the four-judge majority simply ignored and refused to apply the plain language of the California constitution which prohibits tax exemption subsidies for parochial schools 44

A. The California Constitution clearly prohibits tax exemptions for, grants to, or aid of sectarian schools. The plain language of Article XIII, Section 1c of the California Constitution. plus the undisputed evidence in this case, all demonstrate that the 1951 Legislature had no power to "deem" schools to be within the Constitution. The dissenting opinion of the split decision therefore makes it clear that the majority of the California Supreme Court has deprived appellant of due process of law by refusing to follow the clear mandates of the California Constitution 44

B. The challenged statute grants a million dollar subsidy to religious schools. It removes private

Page

real property from the public tax rolls without any limits as to the value or amount of property which may thus be removed and without any restrictions as to whether religious indoctrination or racial and religious discrimination may be conducted in the schools occupying such property. For this reason, a substantial federal question is presented under the Fourteenth Amendment because the statute is vague, indefinite and uncertain and unreasonably discriminates against appellant and all other owners of taxable real property in Alameda County 49

VI. Appellant is entitled to challenge the rulings of the trial court and the California Supreme Court in excluding additional evidence of what is taught in parochial schools and what Roman canonical law provides on the subject of school attendance. Appellant is likewise entitled to challenge the refusal of the California Supreme Court to make findings on these facts. This evidence directly involves the Federal question and goes to prove the unconstitutionality under the Federal Constitution. Appellant was therefore seriously prejudiced when the lower courts refused to consider and make findings on the evidence; and such evidence may now be viewed as though it had been received and held to have no bearing on the validity of the statute 52

Conclusion 56

Table of Authorities Cited

Cases	Pages
Berryman v. Board of Trustees of Whitman College, 222 U.S. 334, 56 L. Ed. 225	49
Brown v. Board of Education, 347 U.S. 483	19, 35, 38, 39
Brown v. Western Railway of Alabama, 338 U.S. 294	54
Canaan v. District, 74 N.H. 517, 70 Atl. 250	30, 32
Carlson v. Washington ex rel. Curtis, 234 U.S. 103	53
Carmichael case, 301 U.S. 495	37
Cochran v. Board of Education, 281 U.S. 370	43
Commonwealth v. Thomas, 119 Ky. 208, 83 S.W. 572	6
Crampton v. Zabriskie, 101 U.S. 601	23, 28
Doremus v. Board of Education, 342 U.S. 429	25, 26, 27
Edwards v. Mercantile Trust Co., 121 Fed. 203	10
Everson v. Board of Education, 330 U.S. 1	18, 26, 28, 30, 32, 35, 44, 55
Eyers Woolen Co. v. Town of Gilsum, 84 N.H. 1, 146 Atl. 511	29, 32
Fairmont Creamery Co. v. Minnesota, 274 U.S. 1	53
Gelston v. Hoyt, 3 Wheat. 246	53
Graham v. Jones, 198 La. 507, 3 So. 2d 761	23
Hans Rees' Sons v. North Carolina ex rel. Maxwell, 283 U.S. 123	53
Herndon v. Lowry, 301 U.S. 242	51
Hillsborough Township v. Cromwell, 326 U.S. 620, 66 S. Ct. 445, 90 L. Ed. 358	36
Holmes v. Republic Steel, 64 N.E. 2d 426 (Ohio)	10
Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203	37
In re Opinion of the Justices, 88 N.H. 484, 190 Atl. 425	40
Keith v. State Funding Board, 127 Tenn. 441, 155 S.W. 142	23
Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110	57
Klopstock v. Superior Court, 17 Cal. 2d 13, 108 P. 2d 906	10

Pages
Lawrence v. State Tax Commission, 286 U.S. 276 24
Lindsay-Strathmore I. Dist. v. Superior Court, 182 Cal. 315, 187 Pac. 1056 9
Lisenba v. California, 314 U.S. 219 52

McCollum v. Board of Education, 333 U.S. 203...19, 30, 32, 35, 36
Massachusetts v. Mellon, 262 U.S. 447 .....23, 28
Merchants National Bank v. Richmond, 256 U.S. 635 53
Mott v. Pennsylvania R. R., 30 Pa. 9, 72 Am. Dec. 664 23

Niemotko v. Maryland, 340 U.S. 268 54

Oyama v. State of California, 332 U.S. 633 50

Pacific Home v. County of Los Angeles, 41 Cal. 2d 844, 264 P. 2d 539 49
Phillips v. Brandt, 231 Minn. 423, 43 N.W. 2d 285 9

Sei Fujji v. State of California, 38 Cal. 2d 718, 242 P. 2d 617 50
Shelley v. Kraemer, 334 U.S. 1 .....50, 52
Southside S. Ch. v. National F. S. Ch., 119 Cal. App. 11, 5 P. 2d 657 8
Spring v. Webb, 227 Fed. 481 10
Sutter Hospital v. City of Sacramento, 39 Cal. 2d 33, 244 P. 2d 390 49
State v. Armory Board, 174 Kan. 369, 256 P. 2d 143 40

Watchtower B. & T. Society v. County of Los Angeles, 30 Cal. 2d 426, 182 P. 2d 178 49
Wheeling Steel Corp. v. Glander, 337 U.S. 562, 69 S. Ct. 1291, 93 L. Ed. 1544 37
Williams v. Baldridge, 48 Idaho 618, 284 Pac. 203 23
Williams v. Riley, 280 U.S. 78 28
Winters v. People of the State of New York, 333 U.S. 507 51

Zorach v. Clauson, 343 U.S. 306 30

Constitutions

Pages

California Constitution:
Article IV, Section 30 45
Article XIII, Section 1 ..... 45, 49
Article IV, Section 8 37
Article XVI, Section 15 18

Codes

Code of Civil Procedure, Section 526a 7, 27, 29

Texts

52 Am. Jur., Taxpayer's Actions, Section 3, p. 3 23

Bouscaren and Ellis, Canon Law (1951), pp. 761-767 18

V The Catholic Encyclopedia (1925), p. 304 16

XIII The Catholic Encyclopedia, p. 555 16

XIV The Catholic Encyclopedia, p. 253 18

Church, State and Freedom, pp. 183-190 (1953) 32

49 Columbia Law Review, p. 968 32

16 C.J.S., Constitutional Law, Section 80, pp. 247 and 248 23

Encyclical Letter of December 31, 1929, on Christian Education of Youth, quoted in Four Great Encyclicals, Paulist Press 14

Encyclical Letter, Pius XI, December 31, 1929, on Christian Education of Youth, Four Great Encyclicals (Paulist Press) p. 63 ..... 16, 17

14 Law and Contemporary Problems, p. 144 32

Pfeffer, Church, State and Freedom, pp. 102-106 (1953) .. 35

Ramstein, A Manual of Canon Law (1947), p. 710 18

Roman Catholic High School Religious Series, Book Three, entitled Living Our Faith 15

II Woywood, A Practical Commentary on the Code of Canon Law (1925), pp. 117-120 18

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956

No. 473

PAUL W. HEISEY,

Appellant,

vs.

COUNTY OF ALAMEDA; CITY OF OAKLAND; RUSSELL C. HORSTMANN, as County Assessor of Alameda County; ROGER COIT, as County Treasurer of Alameda County; EDWIN MEESE, JR., as County Tax Collector of Alameda County; CHESTER STANLEY, as Chairman of the Board of Supervisors of Alameda County; CLIFFORD RISHELL, as Mayor of the City of Oakland; THE ROMAN CATHOLIC WELFARE CORPORATION OF SAN FRANCISCO, Intervenor,

Appellees.

APPELLANT'S BRIEF OPPOSING THE INTERVENOR-APPELLEE'S MOTION TO DISMISS.

Appeal from the Supreme Court of the State of California.

REPLY TO INTERVENOR'S PURPORTED STATEMENT OF FACTS.

Intervenor-appellee's Statement of Facts contains erroneous and misleading remarks. These will be corrected herein by reference to the facts themselves.

I. PLAINTIFF LUNDBERG'S SHOWING OF HIS STATUS AS A CITY AND COUNTY TAXPAYER; OF HIS REPRESENTATION OF CITY AND COUNTY TAXPAYERS AS A CLASS; AND OF THE THREATENED DIRECT PECUNIARY INJURY TO SUCH TAXPAYERS RESULTING FROM PASSAGE OF THE STATUTE GRANTING TAX EXEMPTION SUBSIDIES TO PRIVATE AND RELIGIOUS SCHOOLS.

This is a class suit which was brought by Alfred J. Lundberg as a taxpayer of the City of Oakland and County of Alameda to prevent the loss of tax moneys which was threatened by the city and county officials' declared intention to grant tax exemptions to undercollegiate parochial and church schools pursuant to the 1951 amendment to California Revenue and Taxation Code Section 214. Plaintiff Lundberg clearly put in issue the threatened pecuniary injury to taxpayers as a class by the allegations of his Amended Complaint, which are set forth below:

I.

> At all times mentioned here, plaintiff has been and is the owner of real and personal property located in said defendant County and defendant City, and in the State of California, and a citizen and resident and taxpayer thereof; and assessed for and liable to pay taxes thereon and therein, as provided by law; and within one year before the

commencement of this action has paid taxes thereon and therein.

II.

That the citizen, resident taxpayers of said defendant City and County and of said State number many thousands; that plaintiff and said persons are in the same class; that plaintiff and each and all of said persons are affected by all of the matters and things hereinafter mentioned and are subject to a like injury and damage as the injuries complained of herein; that there are common questions of law and fact affecting their rights, and a common relief is sought; that these persons united in interest with plaintiff are too numerous to make it practical to bring them before the court and that therefore plaintiff brings this action on his own behalf as such owner, resident, citizen and taxpayer, and also in behalf of all and singular the said citizens and residents and taxpayers of said City and County and State.

* * * * * * *

V.

Defendant County and said defendant officers thereof are charged, as provided by law, with the assessment and receipt of returns of all property in said County and City for the purpose of collecting real and personal property taxes, and with the receipt of claims and affidavits for exemption from said taxation; and said defendants are charged, as provided by law, pursuant to said assessments and returns, with the collection of said taxes on all said property, except such taxes and on such property as are exempt therefrom

under and in accordance with valid tax exemption laws.

* * * * * * *

IX.

The defendants, and their agents, servants, officers and employees, unless enjoined and restrained by an order of this court, will under and by virtue of said amendment of 1951, fail to assess and tax, and fail to collect taxes, and will receive and approve claims for exemption, in respect of properties referred to herein, and thereby cast upon and force plaintiff and other taxpayers of said County and City and State to bear and pay the taxes so exempted; said taxes which will be thus borne by plaintiff and said taxpayers, other than those owning the exempted properties, will constitute a substantial and additional burden, as alleged above, and, as plaintiff is informed and believes and hence alleges, will amount in a sum total to many millions of dollars and thus will be added to the tax rolls of actual taxpayers, including plaintiff, and meanwhile the persons, corporations or organizations owning said properties thus immune from real or personal taxes, would receive the facilities for which taxes are necessarily levied, namely, fire, police, health and traffic, among others.

* * * * * * *

XI.

The said intention and acts of defendants to enforce and implement said amendment of 1951, by exempting thereunder said properties, will injure and take from plaintiff and the other taxpayers

> of said County and City and State their said property and property rights, and will cause him and them, material and irreparable loss.

The evidence adduced by plaintiff at the trial from the Roman Catholic priests and the County Assessors clearly demonstrated the truth of the foregoing allegations. The majority of the trial court therefore found these allegations to be true. See Paragraphs 1, 2, 4, 7 and 9 of the Findings of Fact set out in full at pages 20-42 of Appendix B, Statement as to Jurisdiction. The dissenting judge also concurred in these findings. See Paragraphs 1, 3, 4 and 5 of the Dissenting Findings of Fact quoted in full at pages 43-50 of Appendix C, Statement as to Jurisdiction.

Moreover, Intervenor-Appellee Roman Catholic Welfare Corporation itself concedes at page 9 of its brief that around $74,000 in taxes would be lost annually in Alameda County alone from the granting of the exemptions here involved. Recent reports of the California Board of Equalization of which the court can take judicial notice set forth that the assessed value of privately owned property in California exempt from taxation increased during the last year to a record total of over a *billion dollars*. Also, that the biggest relative gain occurred from exemptions under the law we attack as being unconstitutional.

While conceding that the parochial school exemptions would be granted and that this substantial amount of tax moneys would be lost, Intervenor nevertheless argues at page 10 of its supporting brief that there is no evidence that any increase of taxes

on non-exempt property would result in the ensuing year from the granting of the exemption. Apparently Intervenor believes that anticipated tax receipts from one group of taxpayers can be eliminated without passing on the burden to the remaining taxpayers. But common sense tells us this is not so. As the court observed in *Commonwealth v. Thomas,* 119 Ky. 208, 83 S. W. 572, 573:

> "It does not require profound reflection to reach the conclusion that whatever deficit there is in the fiscal budget due the state for any given year by reason of exemptions of property which would otherwise be required to contribute to the common weal is cast as an additional burden upon the other taxpayers . . ."

In any event, this is a suit to prevent a *threatened pecuniary* injury to tax moneys by reason of intended grants of invalid tax exemptions. The best answer to Intervenor can, therefore, be found in the California Supreme Court's own terse comment upholding the right of the plaintiff taxpayer to sue in this case. At the very beginning of its opinion, the California Supreme Court states:

> "Plaintiff, a citizen resident of defendant County and a taxpayer therein, brought this suit to challenge the legality of a tax exemption. Such actions are authorized by Section 526a of the Code of Civil Procedure (cf. Delaney v. Lowary, 25 Cal. 2d 561 and, being in aid of the collection of taxes, are distinguishable from cases in which a party seeking to avoid taxation was denied mandamus on the ground that an action for re-

fund of illegally collected taxes constituted an adequate remedy at law."

Section 526a, which the California Supreme Court refers to, reads in part as follows:

> "An action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of or injury to, the estate, funds, or other property of a county, town, city or city and county of the state, may be maintained against any officer thereof, or any agent, or other person, acting in its behalf, either by a citizen resident therein, or by a corporation, who is assessed for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax therein."

It is thus clear that there is a direct pecuniary injury to the plaintiff taxpayers, and that this suit can be maintained in under this foregoing California Statute.

II. APPELLANT HEISEY'S SHOWING OF HIS DIRECT PECUNIARY INJURY AS A MEMBER OF THE AFFECTED CLASS OF TAXPAYERS; OF HIS ORIGINAL STATUS AS A QUASI PARTY; AND OF THE COMPELLING NECESSITY FOR ALLOWING HIM TO CONTINUE THE PROCEEDINGS AS AN ACTUAL PARTY ON BEHALF OF ALL INJURED TAXPAYERS SIMILARLY SITUATED.

The California Supreme Court rendered its opinion in this case on June 6, 1956. Counsel for Plaintiff Alfred J. Lundberg immediately began preparing a Petition For Rehearing which was required to be filed by June 21st. On June 14, 1956, Alfred Lundberg died.

All taxpayers similarly situated were obviously then in danger of losing their rights asserted in the suit if the Petition For Rehearing were not presented and filed on June 21st and, if that petition were denied, if the matter were not carried to the United States Supreme Court. It must be recalled that out of the 4,804,533 votes cast on the 1952 referendum of this issue, 2,363,528 voters of California voted *against* the parochial school tax exemption statute. And in Alameda County, a *majority* of the votes cast were against approval of the statute. There was, therefore, a most substantial and numerous group and class of California taxpayers interested in seeing this case conclusively settled in favor of the plaintiff.

Appellant Paul W. Heisey pointed out in a verified petition filed with the California Supreme Court (See Appendix A), that it was necessary for him as an individual member of the injured class of taxpayers to be brought into this case as an additional plaintiff and appellant prior to June 21, 1956.

As was previously pointed out, this is a *class suit* to protect a *group* interest and right, namely, the interest of taxpayers to prevent a loss of municipal and county funds through the granting of invalid tax exemptions. In *Southside S. Ch. v. National F. S. Ch.*, 119 Cal. App. 11, 5 P. 2d 657 the court says:

> "The code section permits an informal type of pleading on behalf of an alleged *group* consisting of numerous named and unnamed persons, but *it is the right of the group as such rather than the rights of any named or unnamed individual*

> *or individuals upon which such complaint is based.*" (Emphasis ours)

For this reason, the courts have held that members of the affected group or class are *quasi* parties and may make themselves actual parties whenever it is necessary for the protection of their interests. In *Lindsay-Strathmore I. Dist. v. Superior Court,* 182 Cal. 315, 187 Pac. 1056, the court says:

> "Furthermore, all the persons thus represented are regarded as *quasi parties* and 'may intervene *and make themselves actual parties when necessary for the protection of their interests.*' (15 Ency. of Pl. & Pr. 634, 642) And they are bound by the decree." (Emphasis ours)

The necessity of bringing in an additional member of the class arose from the death of the original plaintiff. His executor declined to continue the suit on behalf of the class.

In *Phillips v. Brandt,* 231 Minn. 423; 43 N. W. 2d 285, the court was concerned with a taxpayer's action and the power to substitute another taxpayer to enable continuation of the litigation. At 43 N. W. 2d 289-291, the court said:

> "As stated, this suit was instituted by Phillips in a representative capacity in behalf of all taxpayers of the city. Larson and Anderson were taxpayers at that time. They were taxpayers thereafter throughout the trial and at the time of their motion, and would be bound by the ultimate judgment obtained in the action. Kaufer v. Ford, 100 Minn. 49, 110 N. W. 364; Ahlquist

> v. Commonwealth Elec. Co., 194 Minn. 598; 261 N. W. 452. Their status is defined in 39 Am. Jur., Parties §44, p. 919, relating to representative suits, as 'parties . . . in a sense before the court; . . . *quasi parties,* and . . . *parties in substance and legal effect.'*
>
> * * * * * * *
>
> *"We hold that it is within the discretion of the trial court to substitute a member of a class for whose benefit the action is brought as representative plaintiff following the death* or disqualification *of the original plaintiff.* Our conclusion in this respect finds ample support in the courts of other states." (Emphasis ours)

The statement of the Minnesota Supreme Court does find support in the authorities. For it is clear that a representative action brought on behalf of the members of a class does survive the death of the original plaintiff. *Spring v. Webb,* 227 Fed. 481; *Edwards v. Mercantile Trust Co.,* 121 Fed. 203; *Holmes v. Republic Steel,* 64 N. E. 2d 426 (Ohio); *Cf. Klopstock v. Superior Court,* 17 Cal. 2d 13; 108 P. 2d 906.

Thus in *Spring v. Webb,* 227 Fed. 481, the court specifically refused to dismiss an action when a representative plaintiff died. Instead, it held that either the personal representative of the original plaintiff or another member of the class might be substituted and permitted to continue the action on behalf of the group.

In this case, therefore, it remained for a member of the class—a quasi party—to seek formal entry into

the case as an actual party so a Petition For Rehearing could be filed before the decision of the California Supreme Court became final, and, if necessary, to carry the case on to the United States Supreme Court.

Appellant Heisey, as such a person, therefore presented a motion and affidavit to the trial court showing his status as an aggrieved taxpayer. Among other things, Heisey stated in his affidavit (see Appendix B):

> "That at all times since January 1, 1950, affiant has been and now is the owner of real and personal property located in the City of Oakland, County of Alameda, State of California, and a citizen and resident and taxpayer thereof; and assessed for and liable to pay taxes thereon and therein, as provided by law; that affiant at all said times has been and is aggrieved and situated similarly as plaintiff, and one of the class of taxpayers for whom the action above was prosecuted by plaintiff and desires that every legal step be taken and exhausted on appeal to prosecute said action for all purposes and to a final determination."

On the basis of this and other proof, the trial court ordered Heisey brought in as an additional plaintiff. (See Appendix C)

Appellant Heisey then applied to the California Supreme Court for permission to be brought in as an appellant. *Contrary to what Intervenor-appellee says, this was not an ex parte proceeding.* Heisey submitted a verified petition, and the California Supreme Court requested counsel for all parties to sub-

mit points and authorities on the necessity and propriety of bringing Mr. Heisey in as an appellant. *Intervenor submitted to the California Supreme Court authorities on this point, before that Court made an order.*

Contrary also to what Intervenor-appellee says, the record is not silent on Mr. Heisey's status as a taxpayer of the City of Oakland and County of Alameda or on his payment of such taxes. In his verified petition filed in the California Supreme Court (see Appendix A), Mr. Heisey stated, among other things:

> "At all times since January 1, 1950, petitioner has been and now is the owner of real and personal property located in the *City of Oakland, County of Alameda,* State of California, and is a *citizen and resident and taxpayer thereof;* and *assessed for and liable to pay taxes thereon and therein,* as provided by law; and *within one year before the commencement of this action paid a tax therein.*
>
> "As is shown on pages 51, and 87-88 of the Clerk's Transcript on this appeal, which are incorporated herein by reference, plaintiff Alfred J. Lundberg commenced and maintained this action on his own behalf as a citizen, resident and taxpayer of the said city, county and state, and also on behalf of all and singular the citizens and residents and taxpayers of said city and county and state.
>
> *"Petitioner at all times has been and is aggrieved and situated similarly as plaintiff and one of the class of taxpayers for whom the action above was prosecuted by plaintiff* and desires that

every legal step be taken and exhausted on appeal to prosecute said action for all purposes and to a final determination.

* * * * * * *

"That petitioner is a proper person to prosecute this action, said Petition for Rehearing, or further appeal on behalf of himself and said citizens and residents and taxpayers similarly situated; that out of a total of 4,804,533 votes cast in the 1952 referendum election in this case, 2,363,528 votes were cast against said referendum; that there is thus illustrated the wide public interest on the part of the citizens, residents, and taxpayers of this state in establishing the constitutional invalidity of the 1951 Amendment to Revenue and Taxation Code §214.

"That by reasons of the steps already taken and threatened to be taken by said executor named in the will of said Alfred J. Lundberg, there is grave danger that unless petitioner individually is brought into this appeal forthwith and authorized to join in said Petition for Rehearing, and any further appeal or petition for certiorari, such action, the rights of appeal, and the rights under said judgment in favor of Alfred J. Lundberg and the said citizens, resident taxpayers may be neglected, greatly damaged, or lost thereby." (Emphasis ours)

It is thus clear under the authorities and the facts that Mr. Heisey is an aggrieved taxpayer, a member of the class for whom this suit was instituted, and a proper person to carry on these proceedings. The California Supreme Court so ruled after a *contested* presentation by Mr. Heisey there! It stated:

"it is ordered that Paul W. Heisey, in his individual capacity be added as an additional plaintiff-respondent in the above entitled appeal."

III. THE PROOF THAT ROMAN CATHOLIC DOCTRINE IS INFUSED INTO AND PERMEATES THE ENTIRE CURRICULUM AND ATMOSPHERE IN THE SCHOOLS RECEIVING 88% OF THE TAX EXEMPTION SUBSIDY. MOREOVER, THE PAPAL DECREES AND CANONICAL LAWS URGE FOR THE ROMAN CATHOLIC SCHOOLS A MONOPOLY ON THIS EDUCATION.

At pages 11-12 and 29, its brief, Intervenor-appellee attempts to create the impression that Roman Catholic parochial schools are operated primarily for secular educational purposes and that only an incidental benefit to religion results from the existence of such schools. Intervenor also asserts that only twenty minutes per day are devoted to teaching Roman Catholic beliefs in parochial schools. This is not only *contrary to the evidence,* but also to the mandate of the Pontiffs in Rome.

In the well-known Encyclical Letter of December 31, 1929, on *Christian Education of Youth,* quoted in *Four Great Encyclicals,* Paulist Press, the following position was taken by Pope Pius XI:

> "For the mere fact that a school gives some religious instruction (often extremely stinted), does not bring it into accord with the rights of the Church and of the Christian family, or make it a fit place for Catholic students. To be this, it is necessary that *all the teaching* and the *whole organization* of the school, and its *teachers, syllabus* and *text books in every branch be regulated*

by the Christian Spirit under the direction and maternal supervision of the Church; so that religion may be in very truth the foundation and crown of the youth's entire training; and this *in every grade of school,* not only the elementary, but the intermediate and the higher institutions of learning as well. To use the words of Leo XIII, 'It is necessary not only that religious instruction be given to the young at certain fixed times, but also that *every other subject taught, be permeated* with Christian piety. If this is wanting, if this sacred atmosphere does not *pervade* and warm the hearts of masters and scholars alike, little good can be expected from any kind of learning, and considerable harm will often be the consequence." (Emphasis ours)

Similarly in Plaintiff's Exhibit 6 for Identification, Book Three of the Roman Catholic High School Religious Series, entitled "Living Our Faith", a book used in Roman Catholic parochial schools throughout California, it is said at page 237:

"In the words of Pope Pius XI: 'It is evident that both by right and in fact the mission to educate . . . belongs to the Church.' This means in practice that students must attend Catholic schools. It is not by any means sufficient that they receive brief instruction outside of school hours. We can only learn, know, and live our religion if we *absorb it constantly from our surroundings.*

"In the ideal educational atmosphere religion is *infused into the whole process of learning.* Students should be *constantly* aware of the unbreakable connection of the world with eternity. Teachers should be Catholics and, whenever pos-

sible, religious. *Textbooks in every branch of knowledge* and on *every level of education* from the first grade to the end of university training, *should be Catholic* publications when they are available." (Emphasis ours)

See also V, *The Catholic Encyclopedia* (1925), p. 304, XIII, *The Catholic Encyclopedia* 555.

IV. INTERVENOR'S ERRONEOUS ASSERTION THAT ROMAN CATHOLIC UNDERGRADUATE SCHOOLS SAVE THE STATE MONEY.

At pages 10-11, Intervenor asserts that Roman Catholic schools save the state money by educating Catholic children without cost to the state.

First—Intervenor's attempt to submit "proof" of this point was rejected in the trial court. There is no such evidence in this case. And as the prevailing party below, Intervenor can hardly claim the benefit of evidence it offered when the trial court refused to admit such evidence and the appellate court refused to reverse on this point.

Second—Roman Catholic children attend Roman Catholic schools because they are *compelled* to. *They have no choice* between Catholic schools and public schools. *They are forbidden to attend public schools,* and in some cases may be excommunicated for doing so. Thus, in "Encyclical Letter, Pius XI, December 31, 1929, on Christian Education of Youth," *Four*

Great Encyclicals (Paulist Press), page 63, Pope Pius XI is quoted as follows:

> "From this it follows that the so-called 'neutral' or 'lay' school, from which religion is excluded, is *contrary to the fundamental principles of education.* Such a school moreover *cannot exist in practice;* it is bound to become irreligious. There is no need to repeat what our Predecessors have declared on this point, especially Pius IX and Leo XIII, at times when laicism was beginning in a special manner to infest the public school.
>
> "We renew and confirm their declarations as well as the Sacred Canons in which the frequenting of non-Catholic schools, whether neutral or mixed, those namely which are open to Catholics and non-Catholics alike, *is forbidden for Catholic children,* and can be at most tolerated, on the approval of the Ordinary alone, under determined circumstances of place and time, and with special precautions." (Emphasis ours)

Through Plaintiff's Exhibit 6 for Identification, Roman Catholic high school children are taught as follows:

> "The Church is opposed to attendance at non-Catholic schools, for she recognizes the real danger to our faith." (page 55)
>
> "Canon Law states: *'Catholic children shall not attend non-Catholic, neutral, or mixed schools,* namely, those which are open also to non-Catholics' (Canon 1374). Therefore, by right and *by Church law parents are required to register their*

children in Catholic schools." (Page 238) (Emphasis ours)

Ramstein, *A Manual of Canon Law* (1947) states at page 710:

> "In some dioceses local law may make it an offense punishable with *ipso facto* communication to send children to a public school without previous approval of the bishop or his delegate, e.g. the pastor."

See also *Everson v. Board of Education,* 330 U.S. 1, 22; XIV *The Catholic Encyclopedia,* p. 253; Bouscaren and Ellis, *Canon Law* (1951), pp. 761-767; II Woywood, *A Practical Commentary on the Code of Canon Law* (1925), pp. 117-120.

Contrast with these proscriptive mandates the declared objective of our various states in establishing, promoting, and maintaining public schools as such. The viewpoint of the People of California is well expressed as follows in Section 15 of Article XVI of the California Constitution:

> ". . . that it is in the interests of the State and of the people thereof for the State to aid school districts of the State in providing necessary and adequate school sites and buildings for the pupils of the Public School System, such system being a matter of general concern inasmuch as the *education of the children of the State is an obligation and function of the State."* (Emphasis added)

In every state of the Union today, the state-supported public school is recognized as the one sure

means of promoting American ideals and perpetuating the democratic way of life. For the public school is free, equal, open to all; free from divisive influence; and dedicated exclusively to the service of *all* our people. In *Brown v. Board of Education,* 347 U. S. 483, 493 this court states in a unanimous opinion:

> "Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society."

As the four concurring Justices stated in *McCollum v. Board of Education,* 333 U.S. 203, 231:

> "The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny."

As Justice Schauer says at 289 P. 2d 438, 444:

> "It is elementary that the conduct of a *public school is a public service* while the operation of a *private school is a private business.*" (Emphasis ours)

The public service performed by the public school is unrelated to the activities of a Roman Catholic parochial school. From the evidence adduced in this case we observe that Roman schools teach that separation of church and state is an evil principle, that public schools are contrary to the fundamental principles of education, that all non-Catholic religions are

counterfeit, that charities such as the Y.M.C.A. and Salvation Army are false religions, that association with non-Catholics is a pitfall that endangers "Faith", that all non-Catholic religious books are forbidden reading, and that a witness may withhold the truth in an American court of justice. We observe that these divisive and undemocratic beliefs are infused into and permeate the whole Catholic educational curriculum and school life. And we say that schools teaching such matters and permeating the educational process with such ideas are not saving the American taxpayers a cent.

The public school is free to all. It provides equal facilities for all. It is open to children of all faiths, colors and creeds. It is free from all sectarian and *divisive* influence. And it strives primarily to bring about a healthy democracy by educating its people to think for themselves, to reject racial and religious intolerance, to work together, to associate freely with each other, and to cherish our *democratic* ideals.

These objectives are the opposite of those of the Roman Church if we may believe the declarations of its pontiff and the teachings found in its school textbooks.

There is therefore a hostile and competitive educational endeavor of the Roman Church to promote its schools to the detriment of the public schools. This saves the public nothing because the public cannot and would not support such indoctrination. *And it saves the public nothing because the Catholic children who*

follow the line cannot and would not attend a public school if one were available.

The simple answer to Intervenor is that Roman Catholic children are required to attend Roman Catholic schools because only there can the children be taught the matters forbidden in public schools and only there can Roman Catholic doctrine "permeate" the educational process. This *private* religious program cannot be equated with public economy.

V. INTERVENOR'S ERRONEOUS ASSUMPTION THAT ROMAN CATHOLIC SCHOOLS PERFORM A PUBLIC SERVICE BECAUSE THEY MUST MEET CERTAIN MINIMUM STATUTORY EDUCATIONAL REQUIREMENTS.

Intervenor's counsel confuses compliance with the law with performance of a public service.

Roman Catholic children are forbidden by Roman Catholic law to attend public schools. The United States Supreme Court has upheld their right so to do as an exercise of freedom of religion. In California certain minimum educational requirements are imposed upon all private schools. Thus they must be full time, have capable teachers, teach in the English language, and offer instruction in the same *branches* of study required to be taught in the public schools of the state.

These minimum requirements obviously do not prevent, nor were they intended to prevent, Roman Catholic schools from injecting and infusing Roman Catholic doctrine into every branch of study that is taught.

And the declarations of the Roman Pontiff and the contents of the textbooks offered in this case prove conclusively that that is done and must be done.

Thus to comply with the law is not to meet the secular educational *objectives* of the public school system. The state does not endorse religious schools. It does not promote them. It cannot support them. And it is forbidden to teach the things in its public schools that are taught in such private schools. The only thing it can do is to insist that certain *minimum* standards be met. This does not mean that the competitive private schools are performing a public service.

Such schools are merely exercising a constitutional right when they indoctrinate sectarian dogma. They are merely complying with the law when they meet full time, teach in the English language, and teach *in their own way* the same branches of study that are taught in the public school. But the state certainly cannot be said to subscribe to the teachings in such private schools or to recognize that such private schools are meeting a public need merely because it insists that certain laws be complied with for the protection of the children in such private schools.

REPLY TO INTERVENOR APPELLEE'S ARGUMENT.

I. APPELLANT HEISEY HAS SHOWN CLEARLY THAT HE AND HIS CLASS ARE IN IMMEDIATE DANGER OF SUSTAINING A DIRECT FINANCIAL INJURY AS TAXPAYERS, AND HE THUS CLEARLY PRESENTS A JUSTICIABLE CONTROVERSY WITHIN THE JURISDICTION OF THE UNITED STATES SUPREME COURT.

It is a universal rule—accepted by the United States Supreme Court—that city or county taxpayers may maintain suits in equity to restrain unlawful governmental action which directly or indirectly leads to taxation and thus increases the burden of taxation.

52 *Am. Jur.,* Taxpayer's Actions §3, p. 3;
16 *CJS,* Constitutional Law, §80, p. 247;
Crampton v. Zabriskie, 101 U. S. 601;
Massachusetts v. Mellon, 262 U.S. 447.

This rule has frequently been applied to uphold suits by taxpayers to enjoin the granting of an unlawful tax exemption.

16 *CJS,* Constitutional Law, §80, p. 248;
Mott v. Pennsylvania R.R., 30 Pa. 9, 72 Am. Dec. 664;
Williams v. Baldridge, 48 Idaho 618, 284 Pac. 203;
Keith v. State Funding Board, 127 Tenn. 441, 155 S.W. 142;
cf. Graham v. Jones, 198 La. 507, 3 So. 2d 761, 769.

In the case of an unlawful grant of tax exemption, the direct pecuniary injury to taxpayers is apparent. As the Court states in *Mott v. Pennsylvania R.R., supra,* 72 Am. Dec. 669:

"The taxpayers, whose burdens will be necessarily increased by releasing from taxation any portion of property liable to contribute to the payment of the public debt and the expenses of government, have also an interest in the question, and, of course, have a right to be heard."

See also *Lawrence v. State Tax Commission,* 286 U.S. 276, where a taxpayer challenged certain exemptions under the Mississippi income tax laws and was permitted to appeal from an adverse decision of the Supreme Court of Mississippi. The United States Supreme Court said at 286 U.S. 282:

"Upon one of the alternative assumptions made by the court, that the amendment is discriminatory, appellant's constitutional rights were infringed when the tax was levied upon him, and state officers acting under the amendment refrained from assessing the like tax upon his corporate competitors. See Iowa-Des Moines Nat. Bank v. Bennett, 284 U.S. 239, 246, ante, 265, 272, 52 S. Ct. 133. If the Constitution exacts a uniform application of this tax on appellant and his competitors, his constitutional rights are denied as well by the refusal of the state court to decide the question, as by an erroneous decision of it, see Greene v. Louisville & Interurban R. Co., 244 U.S. 499, 508, 512 et seq., 61 L. Ed. 1280, 1285, 1287, 37 S. Ct. 673, Ann. Cas. 1917E, 88; Smith v. Cahoon, 283 U.S. 553, 564, 75 L. Ed. 1264, 1272, 51 S. Ct. 582, for in either case the inequality complained of is left undisturbed by the state court whose jurisdiction to remove it was rightly invoked. The burden does not rest on him to test again the validity of the amendment by some pro-

cedure to compel his competitors to pay the tax under the earlier statute. Iowa-Des Moines Nat. Bank v. Bennett, supra (284 U.S. p. 247, ante, 273, 52 S. Ct. 133). See Cumberland Coal Co. v. Board of Revision, 284 U.S. 23, ante, 146, 52 S. Ct. 48. We therefore conclude that the purported non-federal ground put forward by the state court for its refusal to decide the constitutional question was unsubstantial and illusory, and that the appellant may invoke the jurisdiction of this Court to decide the question."

The Intervenor relies on *Doremus v. Board of Education,* 342 U. S. 429, in an attempt to show that appellant's standing as a taxpayer does not bring him within the "case" or "controversy" requirement. But the *Doremus* case did not involve a *pecuniarily aggrieved* taxpayer as this case does. In the *Doremus* case, the plaintiff showed he was a taxpayer, but did not show that taxpayers would be injured. As this Court pointed out at 342 U. S. 429, 431:

"One of the plaintiffs is a 'citizen and taxpayer;' the only interest he asserts is just that and in those words, set forth in the complaint and not followed by specification or proof. It is conceded that he is a citizen and a taxpayer, *but it is not charged* and it is neither conceded nor proved *that the brief interruption in the day's schooling caused by compliance with the statute adds cost to the school expenses or varies by more than an incomputable scintilla the economy of the day's work.* (Emphasis added)

* * * * * * *

"The complaint is similarly niggardly of facts to support a *taxpayer's grievance.* Doremus is al-

leged to be a citizen and taxpayer of the State of New Jersey and of the Township of Rutherford, but any relation of that Township to the litigation is not disclosed to one not familiar with local geography. Klein is set out as a citizen and taxpayer of the Borough of Hawthorne in the State of New Jersey, and it is alleged that Hawthorne has a high school supported by public funds. In this school the Bible is read, according to statute. There is *no allegation that this activity is supported by any separate tax or paid for from any particular appropriation or that it adds any sum whatever to the cost of conducting the school.* No information is given as to what kind of taxes are paid by appellants and there is no averment that the Bible reading *increases any tax they do pay or that as taxpayers they are, will, or possibly can be out of pocket because of it.*" (Emphasis added)

Our case is not like the *Doremus* case. Our case involves the same showing of monetary injury to taxpayers that was involved in *Everson v. Board of Education,* 330 U.S. 1. Plaintiffs Heisey and Lundberg both showed that they were taxpayers of the City of Oakland and County of Alameda; that they were assessed for, liable to pay, and had paid real property taxes to said City and County; that said City and County officials were about to grant an allegedly illegal property tax exemption; that said officials would fail to collect taxes from the exempt properties and *thereby cast* upon and force plaintiffs to bear the taxes so exempted; that a substantial sum would thereby be added to the tax rolls of actual taxpayers; and

that plaintiffs *and said other taxpayers* would thereby have their property and property rights taken from them.

A threatened pecuniary injury to local taxpayers was alleged and proved. It was shown that a substantial amount of tax money would either be lost to the County Treasury or assumed by the remaining non-exempt taxpayers if the threatened exemptions were not enjoined.

This is a dollars and cents injury.

Such an injury is the fundamental requirement of taxpayer suits allowed in California under Code of Civil Procedure Section 526a. Such a dollars and cents, measurable injury was found by *all three* trial judges and confirmed by the California Supreme Court.

Our case, therefore, clearly falls within the threatened pecuniary injury test discussed in the *Doremus* case and ignored in Intervenor's Brief. The Supreme Court said in the *Doremus* case at 342 U.S. 429, 433-434:

> "It is true that this Court found a justiciable controversy in Everson v. Board of Education, 330 U.S. 1, 91 L. Ed. 711, 67 S. Ct. 504, 168 A.L.R. 1392. But Everson showed a measurable appropriation or disbursement of school-district funds occasioned solely by the activities complained of. This complaint does not."
>
> * * * * * * *
>
> *"The taxpayer's action can meet this test* but only when it is a good-faith pocketbook action.

> It is apparent that the grievance which it is sought to litigate here is not a direct dollars-and-cents injury but is a religious difference. *If appellants established the requisite special injury necessary to a taxpayer's case or controversy, it would not matter that their dominant inducement to action was more religious than mercenary.* It is not a question of motivation but of possession of the requisite *financial interest* that is, or is *threatened to be injured* by the unconstitutional conduct."

The case of *Williams v. Riley,* 280 U.S. 78, cited by Intervenor, is not in point because it did not involve a suit by a *county* taxpayer against *county* officials to restrain a threatened loss of *county* funds. And the jurisdiction of this court to entertain such *county* taxpayer appeals as ours is well established. *Crampton v. Zabriskie,* 101 U.S. 601; *Massachusetts v. Mellon,* 262 U.S. 447; *Everson v. Board of Education,* 330 U.S. 1.

Intervenor wrongly states that there is no evidence in the record to show Heisey is or ever was a resident and taxpayer of the defendant city and county. But see his verified petition presented to California Supreme Court, included in the record of this case, and reproduced in Appendix A of this brief. See also Appendix B.

At page 21 of its brief, Intervenor cites three cases to show that a state may grant tax exemptions without violating the Federal Constitution. This may be true. But it is equally true (1) that the state may not

aid religious schools by granting tax exemption subsidies, (2) that it may not make an unreasonable classification or unreasonably discriminate in granting such exemptions, and (3) that it may not grant exemptions for a non-public purpose. These are three *constitutional* limitations on the power to exempt. This is clear from the cases we cite in the following portions of this brief. Intervenor's authorities do not refute these principles which control in our case.

Intervenor next contends that a taxpayer does not suffer a direct pecuniary injury through the granting of an unlawful tax exemption. But if this were so, there could have been no taxpayer suit under California Code of Civil Procedure Section 526a in this case. The clear, direct, measurable pecuniary injury to taxpayers in this case is *certain* to result in one of two ways: Either the amount which Intervenor concedes will be lost must be collected from the remaining taxpayers; *or,* it will truly be *lost* to the County Treasury each year. In either case, there is a direct, added financial burden on taxpayers. But in any event the trial court in this case found from all the evidence "that this burden would thus be added to the tax rolls of actual taxpayers, including plaintiff . . ." See Paragraph 7 of the Findings of Fact at page 26 of Appendix B of the Statement as to Jurisdiction.

The direct pecuniary loss here is best summarized by the language of two New Hampshire cases. In *Eyers Woolen Co. v. Town of Gilsum.* the New Hampshire Supreme Court says at 84 N.H. 1, 146 Atl. 511, 515:

> "The net result of the transaction is to compel the other taxpayers of the town to contribute the plaintiff's (the exempt taxpayers') taxes. It gives the town's money to the plaintiff as effectually as would a direct appropriation of the sum involved.
>
> * * * * * * *
>
> "Such non-payment is, in effect, a compulsory payment of money by those who bear their shares of the common burden, to the privileged person who does not bear his share."

Similarly, in *Canaan v. District,* 74 N. H. 517, 537, 70 Atl. 250, 257, Chief Justice Parsons states:

> "It is undoubtedly true that all exemptions from taxation are practically equivalent to a direct appropriation. Such is the effect of the exemption of . . . seminaries of learning."

II. APPELLANT'S SHOWING THAT THE CHALLENGED STATUTE GRANTS TAX EXEMPTION SUBSIDIES TO, FORCES PUBLIC TAX SUPPORT FOR, AND USES THE FORCE OF THE TAX SYSTEM TO PROMOTE NON-PUBLIC, UNDERCOLLEGIATE, SECTARIAN SCHOOLS CLEARLY PRESENTS A SUBSTANTIAL FEDERAL QUESTION UNDER THE EVERSON AND McCOLLUM DECISIONS.

Intervenor does not attempt to deny the clear mandate of the *Everson* and *McCollum* decisions that:

> A state cannot pass laws which aid one religion, aid all religions, or prefer one religion over another.

Neither does Intervenor deny the equally clear declaration in *Zorach v. Clauson,* 343 U. S. 306, 314-315 that:

> "Government may not finance religious groups . . . nor use secular institutions to force one or some religion on any person."

The simple constitutional question here is whether the State of California has granted substantial financial assistance to religious schools at the expense of those Americans who do not subscribe to what is taught in such schools. In any event, if the force of the tax system was used to promote such schools, then the First Amendment prohibition has been violated.

The evidence in this case demonstrates, and the trial court found, that religious schools in the State of California will be relieved of at least one million dollars in taxes each year by reason of the 1951 tax exemption subsidy statute. In Alameda County alone —if we accept Intervenor's own conceded figure— these schools as of the time of trial would be relieved of $74,000 in taxes. Since then the official reports indicate a record increase.

This is financial aid! It is substantial, financial aid! It constitutes the use of the force of the tax system to give that aid! And the aid is at the direct pecuniary expense of non-exempt taxpayers who may disbelieve the divisive dogma taught in such schools.

The obnoxious burden thus imposed upon non-exempt taxpayers is best summarized in the statements already quoted from the New Hampshire Supreme Court decisions:

> "The net result of the transaction is to compel the other taxpayers of the town to contribute the plaintiff's (the exempt taxpayers') taxes. It

gives the town's money to the plaintiff as effectually as would a direct appropriation of the sum involved.

* * * * * * *

"Such non-payment is, in effect, a compulsory payment of money by those who bear their shares of the common burden, to the privileged person who does not bear his share." *Eyers Woolen Co. v. Town of Gilsum,* 146 Atl. 511, 515.

"It is undoubtedly true that all exemptions from taxation are practically equivalent to a direct appropriation." *Canaan v. District,* 74 N. H. 517, 537, 70 Atl. 250, 257.

All that we are required to do at this point is to show that a "substantial" Federal question is presented for review by this Court. We believe that the decision in the *McCollum* case, the proved pecuniary injury in this case, and the obvious aid and benefit to religious schools, demonstrate the substantiality of the question. Our conclusion is confirmed by almost every legal writer who has written on the scope of the First Amendment since the *Everson* and *McCollum* decisions. Thus in 49 Columbia Law Review, 968, there is an entire note on the subject of tax exemption subsidies granted to religion; and the writer concludes that such tax exemptions clearly violate the First Amendment in light of the *Everson* and *McCollum* decisions. The same conclusion is reached by Paulsen in an exhaustive treatment of the problem in 14 Law and Contemporary Problems 144. Pfeffer also reaches this conclusion in his timely book entitled "Church, State and Freedom," pages 183-190 (1953).

And see the other law review articles referred to at pages 22-23 of Appellant's Statement as to Jurisdiction.

Intervenor has not produced a single case to refute appellant's contention that tax exemptions for parochial schools in California constitute an annual subsidy of over one million dollars, go almost exclusively for the support and benefit of Roman Catholic schools, and thus go to foster and promote schools which are "permeated" with a doctrine that teaches hostility to the principle of separation of church and state, hostility to the public schools, and hostility toward non-Catholics.

This is an obnoxious financial burden which clearly falls within the prohibition of the First Amendment and comes within the declaration of Thomas Jefferson that:

> "To compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical."

The majority opinion of four justices of the California Supreme Court "answers" this contention by asserting that the oppressive burden of tax exemptions for parochial schools is justified by the fact that it existed in colonial times and continues in most states today. Intervenor places a similar reliance upon "history" (see Supporting Brief pages 30-36). But such arguments rely upon an invalid premise. For establishments of religion were themselves in vogue on the state level when and after the Federal Con-

stitution was adopted. In an excellent and carefully documented review of the situation in the states at the time of the adoption of the Federal Constitution, Pfeffer summarizes the facts as follows:

> Two out of thirteen, Virginia and Rhode Island, conceded full freedom [of religion];
>
> One, New York, gave full freedom except for requiring naturalized citizens to abjure foreign allegiance and subjection in all matters ecclesiastical as well as civil;
>
> Six, New Hampshire, Connecticut, New Jersey, Georgia, North and South Carolina ADHERED TO RELIGIOUS ESTABLISHMENTS;
>
> Two, Delaware and Maryland, demanded Christianity;
>
> Four, Pennsylvania, Delaware, North and South Carolina, required assent to the divine inspiration of the Bible;
>
> Two, Pennsylvania and South Carolina, imposed a belief in heaven and hell;
>
> Three, New York, Delaware, and South Carolina, excluded ministers from civil office;
>
> Four, Maryland, Virginia, North Carolina, and Georgia, excluded ministers from the legislature;
>
> Two, Pennsylvania and South Carolina, emphasized belief in one eternal God;
>
> One, Delaware, required assent to the doctrine of the Trinity;
>
> Five, New Hampshire, Massachusetts, Connecticut, Maryland, and South Carolina, insisted on Protestantism;
>
> One, South Carolina, still referred to religious "toleration".

See Pfeffer, *Church, State and Freedom,* pp. 102-106 (1953).

It is therefore obvious that if one were to rely upon the "history" of church-state establishments at the time of the adoption of the Federal Constitution, a complete *union* of church and state could be justified today upon the basis of the situation in 1789 in at least six states. But the Supreme Court in the *Everson* and *McCollum* cases did not rely upon history in this manner. Instead, it pointed to the abuses of church-state union which had drawn colonists to the Americas and led to the abuses in the colonies. These abuses in turn led to insistence upon an "establishment of religion" clause at the *Federal* level in 1789. Finally, they led to the awakening of religious freedom on the *state* level after 1789, then to the rise of the public school system, and then to the application of the Federal principle to the states by reason of the adoption of the Fourteenth Amendment. Here, then, was the real application of history—an appreciation of the abuses which led to the adoption of the First Amendment and which justified the application of First Amendment principles to the states *in later years* through the Fourteenth Amendment. It was this sort of judicial application of historical *lessons* that formed a basis for that other great Fourteenth Amendment decision in *Brown v. Board of Education,* 347 U.S. 483.

From a historical standpoint, therefore, it is of course true that tax exemptions for church schools existed in the colonies and at the time of the adoption

of the Federal Constitution. It is just as true that there was pervasive church-state unity in the states at the time of the adoption of the Federal Constitution. And the reason for granting exemptions at that time was the fact that church schools *were* the state schools.

Today, *non-sectarian* schools are the only legitimate state schools. Today, church-state unity is forbidden. Today church schools do not constitute state schools. And today the oppressive practice of compelling taxpayers to grant church-school subsidies through tax exemptions should be struck down as state aid to religion just as surely as was the oppressive state aid in the *McCollum* case.

III. APPELLANT'S SHOWING THAT THE CHURCH-SCHOOL EXEMPTION STATUTE FORCES APPELLANT AND OTHER TAXPAYERS WHO ARE PROSCRIBED FROM SECTARIAN INDOCTRINATION IN THE PUBLIC SCHOOLS TO SUPPORT NON-PUBLIC SCHOOLS WHICH INSTRUCT ON THESE FORBIDDEN SECTARIAN MATTERS CLEARLY PRESENTS A SUBSTANTIAL QUESTION WITHIN THE PROHIBITION OF THE EQUAL PROTECTION CLAUSE.

In *Hillsborough Township v. Cromwell,* 326 U. S. 620, 66 S. Ct. 445, 90 L. Ed. 358, 363, the United States Supreme Court states:

> "The equal protection clause of the Fourteenth Amendment protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class."

See also *Wheeling Steel Corp. v. Glander,* 337 U. S. 562, 69 S. Ct. 1291, 93 L. Ed. 1544. Also in the *Carmichael* case, 301 U. S. 495, which Intervenor cites so frequently, it is apparent from the exhaustive discussion of the Supreme Court that the state may not make an unreasonable classification for exemption purposes and that exemptions will be declared invalid where there is an unreasonable discrimination against people in the same class.

On the question of state support for sectarian indoctrination in our primary and secondary schools, appellant and The Roman Catholic Welfare Corporation of San Francisco are in the same class. Appellant Heisey has a legitimate interest in seeing his particular religious beliefs indoctrinated in the public school system he is compelled to support. If he were an atheist, he would have a legitimate interest in seeing atheistic doctrines taught in such schools. Yet the California Constitution and the United States Constitution both prevent him from having this done. Under both constitutions, it is clear that no sectarian or denominational doctrine may be taught or permitted, directly or indirectly, in any of the state supported public schools of California, Section 8, Article IX *California Constitution; Illinois ex rel, McCollum v. Board of Education,* 333 U. S. 203. Yet under the challenged California exemption subsidy statute, appellant and other taxpayers similarly situated are forced to give tax support to private, competitive, undercollegiate sectarian schools whose avowed purpose

is the permeation of the entire educational atmosphere with Roman Catholic doctrines.

This state action which proscribes appellant from having his religious beliefs indoctrinated in state supported public schools on the one hand and yet uses state support for and compels plaintiff to give support to private schools that indoctrinate religious doctrines which he disbelieves on the other is a clear and unreasonable discrimination against plaintiff and other taxpayers similarly situated.

It is plain under the important decision in *Brown v. Board of Education,* 347 U. S. 483, that if state support is to be given to education, it must be given on an equal basis. Thus the state cannot support one set of schools which do not draw the line as to color and yet support another set of schools, whether public or private, which do discriminate on the basis of color. And certainly it is an obvious conclusion to be drawn from the *Brown* decision that the state likewise cannot support one set of public schools where sectarianism is forbidden and yet support another set of schools, whether public or private, where sectarianism is "infused into" and "permeates" the entire educational atmosphere. In either case—whether the state supports a dual set of schools, one set discriminating along racial lines, or a dual set of schools one set discriminating along religious lines—there is an unreasonable classification and an arbitrary discrimination. This is therefore the question that appellant presents under the equal protection clause of the Fourteenth Amendment.

Intervenor has presented no argument in answer to appellant's contention that all persons are equally entitled to have our *state-supported* educational processes free, equal, non-sectarian, and available to all. The Roman Catholic schools which received 88% of the California tax exemption subsidy benefit are not free, are avowedly sectarian, and are not available to all. *By reason of the fact that there is state support, through the tax exemption subsidy statute,* there is an unreasonable discrimination against plaintiff and those who are forced to pay the bill. On the other hand, if these Roman Catholic schools would pay their own way and pursue their own activities at their private expense, there could be no equal protection question. The controversy here arises because private schools seek public money while pursuing unequal and discriminatory practices forbidden to the public in the other schools—the public schools—which are state supported. The state support itself violates the First Amendment, but the illegality is compounded by reason of the arbitrary discrimination also involved.

We cannot believe that the United States Supreme Court could rule in the *Brown* case that there shall be no discrimination in the public schools and yet pave the way for *state-supported* discrimination in private schools either on the basis of race or religion. Therein lies the direct applicability of the *Brown* case to ours.

IV. APPELLANT'S SHOWING THAT THE OVERWHELMING PREPONDERANCE OF TAX EXEMPTION SUBSIDY HERE GOES TO PRIVATE SCHOOLS WHOSE WHOLE EDUCATIONAL ATMOSPHERE IS PERMEATED WITH SECTARIAN DOGMA CLEARLY PRESENTS A CASE OF TAX EXEMPTION FOR A NON-PUBLIC PURPOSE WITHIN THE PROHIBITION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Tax exemptions for non-public purposes are forbidden under the constitutions of most states and under the United States Constitution. Intervenor apparently concedes this point.

For example, in *State v. Armory Board,* 174 Kan. 369, 256 P. 2d 143, 152, the Kansas Supreme Court states:

> "In order, however, for the legislature to extend exemptions beyond those expressly designated in the Constitution, they must have a *public purpose* and be designed to promote the *public* welfare." (Emphasis ours)

Similarly, *In Re Opinion of the Justices,* 88 N. H. 484, 190 Atl. 425, 429, the New Hampshire Supreme Court states:

> "As a corollary to the prohibition against taxation to aid a private purpose, legislation resulting in or leading to taxation therefor is also invalid. *The legislature may not exercise* or delegate *its taxing power for private benefit through the indirect expedient of an exemption.*" (Emphasis ours)

The point we make here, of course, is that the Roman Catholic parochial schools, which receive 88 per cent of the benefit of the challenged tax exemption

statute, are not organized and do not exist to perform a public service. Instead, they are for private uses and purposes. Intervenor counters with the argument that such private sectarian schools are authorized by law and comply with the law in the matter of their curriculum. Once again we say that Intervenor confuses compliance with the law with performance of a public service.

The unique contribution of this case to an understanding of the problem of state support for undergraduate religious schools is the evidence plaintiff adduced of the subjects actually taught in the undergraduate Roman schools receiving 88% of the subsidy benefit. Plaintiff sought to do even more. He offered textbooks in use in such schools to show the divisive nature of the sectarian dogma indoctrinated therein. See Appendix E of the Statement as to Jurisdiction for representative quotations from the textbook, "Living Our Faith", in use throughout Roman Catholic parochial schools of California.

Plaintiff also produced the recent declarations in Roman Catholic encyclopedias and by the Roman Popes that each and every subject taught in Roman Catholic schools must be *permeated* with sectarianism and that Roman Catholic beliefs are to be *"infused into the whole process of learning"*.

It is precisely because the Roman Catholic educational atmosphere *is* permeated in whole or in part with divisive sectarianism that state support to Roman Catholic educational institutions cannot possibly serve a public purpose. One might contend, as

Intervenor does, that state aid to Roman Catholic parochial schools constitutes aid to *secular* education and that the aid to religion is only incidental. But the claim falls instantly in the face of the *evidence* in this case. For secular education—the sort the public can constitutionally support—is unknown in the Roman Catholic parochial schools. That is why Roman Catholic children are prohibited from attending public schools. It is why Pius XI declares that the "neutral" public school "from which religion is excluded, is contrary to the fundamental principles of education".

We say that no public purpose can ever be served by schools which teach and infuse into the whole or partial process of learning the belief that separation of church and state is an evil compromise (Appendix, St. Jur., p. 53); that non-Catholic methods of worshipping God are counterfeit (Appendix, St. Jur., p. 53); that the Salvation Army and the Young Men's Christian Association are false religions (Appendix, St. Jur., pp. 54-55); that Catholics may not cooperate with or associate with Knights of Pythias, Odd Fellows, Sons of Temperance, or Masons (Appendix, St. Jur., pp. 55-56); that public schools are contrary to the fundamental principles of education (Appendix, St. Jur., pp. 56-57); that any books contrary to Catholic beliefs are forbidden (Appendix, St. Jur., pp. 57-58); and that a witness may withhold the truth in an American court of justice (Appendix, St. Jur., p. 58).

One need not be opposed to Catholicism or hostile to religion to contend that the teaching of such doc-

trines is private business and serves no public purpose. In America we are dedicated to the proposition that sectarian beliefs *are* matters of private concern and matters for private support only. Plaintiff, therefore, presents a substantial federal question when he shows that matters obviously private are infused into and in fact permeate the *process of learning* in the schools receiving the state support in this case. The schools admittedly must comply with the law in the matter of their general curriculum; and students who attend these schools do so as a matter of constitutional right. But a tax exemption subsidy for such schools is a tax exemption for a non-public purpose and is clearly within the prohibition of the due process clause of the Fourteenth Amendment.

Intervenor attempts to answer this argument by pointing to the statements in *Cochran v. Board of Education,* 281 U. S. 370, and *Everson v. Board of Education,* 330 U. S. 1. It is true that a five-judge majority of this court rejected a "public purpose" argument in the *Everson* case. But it is also true, however, as Mr. Justice Jackson commented, that the record in the *Everson* case was completely devoid of proof as to what was taught in Roman Catholic parochial schools.

We have said repeatedly that plaintiff in our case presented no such scanty record. Thus plaintiff directed attention to the Roman Catholic Encyclopedias and to the admissions of the Roman Popes that Catholicism permeates and is infused into the *whole process of learning.* Plaintiff also showed the hostile

and divisive nature of the dogma thus infused into the educational atmosphere.

These are new points. They present new and compelling proof that parochial schools serve a private purpose and that their teaching is private business. Appellant therefore believes that a substantial question is presented on the "public purpose" point by reason of these new and compelling features not presented or available to this court in the *Everson* case.

V. APPELLANT ALSO HAS PRESENTED OTHER AND SUBSTANTIAL FEDERAL QUESTIONS ARISING UNDER THE DUE PROCESS CLAUSE. THE SUBSTANTIALITY IS DEMONSTRATED BY THE THREE-JUDGE DISSENTING OPINION OF THE CALIFORNIA SUPREME COURT WHICH POINTS OUT THAT THE FOUR-JUDGE MAJORITY SIMPLY IGNORED AND REFUSED TO APPLY THE PLAIN LANGUAGE OF THE CALIFORNIA CONSTITUTION WHICH PROHIBITS TAX EXEMPTION SUBSIDIES FOR PAROCHIAL SCHOOLS.

A. The California Constitution clearly prohibits tax exemptions for, grants to, or aid of sectarian schools. The plain language of Article XIII, Section 1c of the California Constitution, plus the undisputed evidence in this case, all demonstrate that the 1951 Legislature had no power to "deem" schools to be within the Constitution. The dissenting opinion of the split decision therefore makes it clear that the majority of the California Supreme Court has deprived appellant of due process of law by refusing to follow the clear mandates of the California Constitution.

We shall not repeat the evidence nor arguments set forth in our Statement as to Jurisdiction. Intervenor has haughtily chosen to disregard the entire question. But we should point out that the California Constitution clearly prohibits any property tax exemptions

not *specifically* granted by the Constitution. *California Constitution,* Article XIII, Section 1. It also clearly prohibits any grants to or in aid of sectarian schools. *California Constitution,* Article IV, Section 30. And there is not a word in the California Constitution which pertains to undercollegiate private or parochial schools, although there are many sections dealing with other types of schools and educational purposes. The evidence of pertinent legislative history in this case, plus the clear assurance given to the California voters in 1944 when they adopted the Welfare Exemption that:

> ". . . schools other than colleges *will not be exempted* under this amendment because the Legislature expressly eliminated the term 'educational'."

should have *compelled* any court which was following the Constitution to deny the attempted exemption of parochial schools by the Legislature in 1951. The California Legislature has no power to "deem" what shall be in the California Constitution.

The clear deprivation of ordinary due process of law here is demonstrated by the unusually frank opinion of the three-judge minority of the California Supreme Court. The following excerpts from Justice Schauer's Dissenting Opinion, concurred in by Justices Shenk and Carter, should demonstrate the fundamental due process issue:

> "Since 1914 the provisions of section 1a of Article XIII of the California Constitution have exempted from taxation the property of a non-

profit '*educational institution of collegiate grade,* . . . used exclusively for the purposes of education.' (Italics added.) The quoted language is specific; *it leaves no room for speculation or 'construction.'* The majority opinion holds that the language of section 1c of the same Article of the Constitution, adopted in 1944, which authorizes the Legislature to exempt from taxation property 'used exclusively for *religious, hospital* or *charitable* purposes and owned by' (Italics added) certain institutions, likewise authorizes the exemption of all the property of such institutions which is used for educational purposes of any character or grade—more specifically, property used for *schools of less than collegiate grade.* This holding is reached despite the fact that the word 'educational' is notably absent from the 1944 amendment.

"To so construe section 1c of Article XIII as to encompass educational purposes, in addition to the 'religious, hospital or charitable purposes' which are expressly designated in the section, *does violence to the plain meaning of the language used, to the intent of the voters who adopted the section, and to settled principles of statutory construction.*

* * * * * * *

[See detailed proof of this point in dissenting opinion]

* * * * * * *

". . . In view of these unusually express and specific designations in the Constitution of the property to which the people are willing to grant tax exemption, it appears to me too clear for serious debate *among jurists following the law*

that if by the provisions of section 1c of Article XIII it was intended to grant exemption to property devoted to educational purposes, then the language used would have said so, clearly and precisely.

* * * * * * *

". . . It is my firm conviction that this court should not, *in the guise of statutory construction, effect an amendment of the Constitution which the voting citizens of California have repeatedly rejected.*

* * * * * * *

"'. . . The provisions of . . . [California's] Constitution are *mandatory and prohibitory,* unless by express words they are declared to be otherwise.' (Const. Art. I, §22.) The justices of this court, regardless of personal views on social, political, economic or *religious* subjects, are *in duty bound to support the Constitution and laws of this state.* 'The powers of the government of . . . California shall be divided into three separate departments—the legislative, executive, and judicial; and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the others, except as in this Contion expressly directed or permitted.' (Const. Art. III, §1.) Obedient to my concept of *judicial duty* I must apply the firmly established principles of construction above delineated, give effect to the *plain intent* and specific language of the framers of section 1c of Article XIII of the Constitution, respect the principle of division of powers of government above quoted, and hold unauthorized the purported exemption of property,

> however laudatory the objectives, wihch is sought to be sustained on the sole basis that the property is 'used exclusively for school purposes of less than collegiate grade'—a use which is not of a character specified in the constitutional authorization, and which is *therefore beyond the power of either the Legislature or this court to write into the Constitution.*" (Emphasis ours)

This, then, is not simply a case where a state court has construed a state statute or decided a question of state law or of local practice. It is a case where the Constitution of California plainly commands that all property in this state shall be taxed unless the Constitution specifies otherwise and where the Constitution *plainly* does not specify otherwise. Thus to use the argument of "construction" in this case to override a constitutional prohibition, expressly inserted to protect the taxpaying public, is to do away with fundamental rights in violation of principles of ordered liberty. The question here is a substantial one. It shocked the sense of constitutional fairness of three justices of the California Supreme Court. It should be presented to the United States Supreme Court for plenary consideration with briefs on the merits and oral arguments for its resolution.

B. The challenged statute grants a million dollar subsidy to religious schools. It removes private real property from the public tax rolls without any limits as to the value or amount of property which may thus be removed and without any restrictions as to whether religious indoctrination or racial and religious discrimination may be conducted in the schools occupying such property. For this reason, a substantial federal question is presented under the Fourteenth Amendment because the statute is vague, indefinite and uncertain and unreasonably discriminates against appellant and all other owners of taxable real property in Alameda County.

As previously stated, the California Constitution *requires* that *all property be taxed unless specifically exempted* by the California Constitution or laws of the United States. *California Constitution,* Article XIII, Section 1. To effectuate this rule, in California and elsewhere, the courts have insisted that constitutional exemption provisions be strictly construed; and that any doubt as to authority be resolved against the proposed exemption, *Berryman v. Board of Trustees of Whitman College,* 222 U. S. 334, 56 L. Ed. 225; *Sutter Hospital v. City of Sacramento,* 39 Cal. 2d 33, 244 P. 2d 390; *Pacific Home v. County of Los Angeles,* 41 Cal. 2d 844, 264 P. 2d 539, the aim being to secure the equality of taxation which results from subjecting all property to the same burden. *Watchtower B. & T. Society v. County of Los Angeles,* 30 Cal. 2d 426, 429, 182 P. 2d 178.

The split, 4-3 decision of the California Supreme Court in this case now opens the floodgates to legislative grants of exemption subsidies to undergraduate private and religious schools. This despite the fact that there is no mention whatsoever of such private

schools in the Constitution. This despite the fact the legislative act contains no limitation on the amount or value of such private property which may thus be removed from the tax rolls. And this despite the fact that there are no restrictions whatsoever on the religious indoctrination or racial discrimination which may be practiced in the private schools whose property is thus benefited at the public expense.

In *Shelley v. Kraemer,* 334 U. S. 1, 10, the United States Supreme Court ruled, at page 10:

> "Equality in the enjoyment of property rights was regarded by the framers of that [the Fourteenth] Amendment as an essential precondition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee."

And at page 20:

> "We have noted that freedom from the discrimination by the states in the enjoyment of property rights was among the basic objectives sought to be effectuated by the framers of the Fourteenth Amendment."

See also *Oyama v. State of California,* 332 U. S. 633, and *Sei Fujji v. State of California,* 38 Cal. 2d 718, 242 P. 2d 617, where the California Supreme Court says:

> "There can be no question that the rights to acquire, enjoy, own, and dispose of property are 'among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment,' and that the power of a state to regulate the use and ownership of land

must be exercised subject to the controls and limitations of that Amendment."

These cases make clear that there can be no unreasonable discrimination against any person in the direct, annual ad valorem taxation of real property within the dominion of a state, or deprivation of the right to property as guaranteed by the due process clause.

Under the case of *Winters v. People of the State of New York,* 333 U. S. 507, it is also plain that the Due Process clause is violated where the fundamental property rights of our people are in danger of being infringed upon because a state law is too *vague, indefinite,* and *uncertain.* See also *Herndon v. Lowry,* 301 U. S. 242, 264.

The 1951 exemption statute here authorizes carte blanche tax exemption subsidies to *private* property owners such as The Roman Catholic Welfare Corporation of San Francisco. It has no constitutional reference point. It is subject to no constitutional limitation as to where the private properties must be located or what amount of properties may be exempted. It is subject to no limitation as to racial or religious discrimination which the private school properties may condone.

Appellant therefore contends that the 1951 statute deprives all non-exempt real property owners of their fundamental Fourteenth Amendment constitutional rights to equality in the taxation of private real property rights and protection from vague legislation or

court opinions paving the way to exempt real property, always before taxable, and so increase the annual tax rate on the real property owned by appellant, and so compelling him and all other owners of taxable real property to pay taxes to help support private or religious schools, contrary to 14th Amendment as interpreted, construed and applied in *Shelley v. Kraemer,* 334 U.S. 1 and controlling cases, interpreting the 1st and 14th Amendments.

VI. APPELLANT IS ENTITLED TO CHALLENGE THE RULINGS OF THE TRIAL COURT AND THE CALIFORNIA SUPREME COURT IN EXCLUDING ADDITIONAL EVIDENCE OF WHAT IS TAUGHT IN PAROCHIAL SCHOOLS AND WHAT ROMAN CANONICAL LAW PROVIDES ON THE SUBJECT OF SCHOOL ATTENDANCE. APPELLANT IS LIKEWISE ENTITLED TO CHALLENGE THE REFUSAL OF THE CALIFORNIA SUPREME COURT TO MAKE FINDINGS ON THESE FACTS. THIS EVIDENCE DIRECTLY INVOLVES THE FEDERAL QUESTION AND GOES TO PROVE THE UNCONSTITUTIONALITY UNDER THE FEDERAL CONSTITUTION. APPELLANT WAS THEREFORE SERIOUSLY PREJUDICED WHEN THE LOWER COURTS REFUSED TO CONSIDER AND MAKE FINDINGS ON THE EVIDENCE; AND SUCH EVIDENCE MAY NOW BE VIEWED AS THOUGH IT HAD BEEN RECEIVED AND HELD TO HAVE NO BEARING ON THE VALIDITY OF THE STATUTE.

At pages 40-41 of its brief, Intervenor attempts to deal with the proffered proof as though the question merely involved state practice. Intervenor therefore cites a number of irrelevant cases, such as *Lisenba v. California,* 314 U.S. 219, which hold that the United States Supreme Court does not sit to review the evidentiary rulings of state courts. But

the Intervenor's cases have nothing to do with our situation. We offered evidence going directly to prove a violation of the United States Constitution. That proffer nevertheless was rejected by the state courts. The latter type of evidence does not simply involve a matter of state practice. It involves the fundamental right of a litigant to present evidence which will demonstrate his contention that the United States Constitution has been violated. If local courts could reject all such evidence and escape having their decisions reviewed on the ground that such evidentiary questions merely concern "state practice," the United States Supreme Court would be powerless to learn the facts in the most glaring violations of the Bill of Rights.

Obviously Intervenor seeks to invoke the wrong rule.

In two cases, *Hans Rees' Sons v. North Carolina ex rel. Maxwell,* 283 U.S. 123, and *Fairmont Creamery Co. v. Minnesota,* 274 U.S. 1, the appellant had offered evidence in the state courts to prove the Federal Constitution had been violated. In each the United States Supreme Court not only took up the evidentiary question, but expressly pointed out that it was *entitled to view the case as though the evidence had been received* and held to have no bearing on the validity of the statute. See also *Gelston v. Hoyt,* 3 Wheat. 246.

Again in the cases of *Merchants National Bank v. Richmond,* 256 U.S. 635, and *Carlson v. Washington ex rel. Curtis,* 234 U.S. 103, the state courts had re-

fused to pass on certain evidence or make findings of fact thereon because of their view that such evidence was immaterial. But, as the Supreme Court pointed out at 256 U.S. 638:

> "But this determination does not relieve us of the duty of examining the evidence for the purpose of determining what facts reasonably might be, and presumably would be, found therefrom by the state court, if plaintiff in error's contention upon the question of Federal law should be sustained, and the facts thereby shown to be material."

In *Brown v. Western Railway of Alabama,* 338 U.S. 294, the United States Supreme Court points out:

> "The assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice."

Similarly, in *Kern-Limerick, Inc., v. Scurlock,* 347 U.S. 110, this court pointed out that the duty rests on the Supreme Court to decide for itself facts or constructions upon which Federal constitutional issues rest. Moreover, in *Niemotko v. Maryland,* 340 U.S. 268, the court said at page 271:

> "In cases in which there is a claim of denial of rights under the Federal Constitution, this court is not bound by the conclusions of the lower courts, but will re-examine the evidentiary basis upon which those conclusions are founded."

As we pointed out in the Statement as to Jurisdiction, Mr. Justice Jackson specifically complained in

Everson v. Board of Education, 330 U.S. 1, at page 22, that the record was too meager on the function of the Roman Catholic Sectarian schools and showed only that schools were taught under superintendence of priests and that religion was taught therein. It was because of this problem and in order to show that Roman sectarianism permeates and is infused into the entire process of learning in those undergraduate schools that plaintiff sought to introduce the textbooks and proof of Canonical law in this case. The evidence was clearly relevant and material on the issues under the First Amendment, under the equal protection clause, and under the due process clause for the reasons set forth in earlier portions of this brief. Moreover, the evidence directly refuted the testimony of the Roman Catholic school superintendents that religion took up only a small portion of the school day. Plaintiff laid a full and careful foundation for the introduction of the evidence, and no objection was made on that ground. The situation is simply that the trial court rejected the evidence as irrelevant, and the California Supreme Court refused to accept the evidence at the appellate level or to make findings upon it, though in accordance with its rules the documentary evidence was transmitted to the California Supreme Court. It now has been transmitted to this court.

CONCLUSION.

For the reasons stated, it is respectfully submitted that Intervenor-Appellee's Motion to Dismiss should be denied; that this court should make an order noting probable jurisdiction; and that plenary consideration should be given to the questions, with briefs on the merits and oral arguments.

Dated, San Francisco, California,
November 12, 1956.

Respectfully submitted,
HENRY C. CLAUSEN,
Counsel for Appellant.

(Appendices A, B and C Follow.)

Appendix A

Henry C. Clausen
315 Montgomery Street
San Francisco 4, California
Telephone: YUkon 6-0727
Attorney for Petitioner

Filed June 26, 1956,
William R. Sullivan,
R. J. Bell, S. F., Deputy.

In the Supreme Court of the State of California

S.F. 19,026

Alfred J. Lundberg,
Plaintiff and Respondent,
vs.
County of Alameda, et al.,
Defendants and Appellants,
The Roman Catholic Welfare Corporation of San Francisco (a Corporation),
Intervenor and Appellant.

PETITION OF PAUL W. HEISEY FOR ORDER BRINGING HIM IN INDIVIDUALLY, MAKING HIM A PARTY TO THIS ACTION ON APPEAL, AND PERMITTING HIM TO JOIN IN RESPONDENT ALFRED J. LUNDBERG'S PETITION FOR REHEARING.

To the Honorable Phil S. Gibson, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the State of California:

Petitioner, Paul W. Heisey, respectfully requests an order bringing him in, making him a party to this

action on appeal, and permitting him to join in respondent Alfred J. Lundberg's Petition for Rehearing; and in support thereof states:

At all times since January 1, 1950, petitioner has been and now is the owner of real and personal property located in the City of Oakland, County of Alameda, State of California, and is a citizen and resident and taxpayer thereof; and assessed for and liable to pay taxes thereon and therein, as provided by law; and within one year before the commencement of this action paid a tax therein.

As is shown on pages 51, and 87-88 of the Clerk's Transcript on this appeal, which are incorporated herein by reference, plaintiff Alfred J. Lundberg commenced and maintained this action on his own behalf as a citizen, resident and taxpayer of the said city, county and state, and also on behalf of all and singular the citizens and residents and taxpayers of said city and county and state.

Petitioner at all times has been and is aggrieved and situated similarly as plaintiff and one of the class of taxpayers for whom the action above was prosecuted by plaintiff and desires that every legal step be taken and exhausted on appeal to prosecute said action for all purposes and to a final determination.

On June 14, 1956, after the commencement of this action, and while the same was still pending in this Court, the plaintiff herein, Alfred J. Lundberg, died in the City of Oakland, County of Alameda, State of California.

Prior to his said death, said Alfred J. Lundberg was seeking a rehearing in said case in this Court and had authorized and instructed Henry C. Clausen, as his attorney of record in said case, to prepare and file a petition for said purpose; and that said petition had been substantially completed and approved by plaintiff prior to such date of death.

Said Alfred J. Lundberg died testate leaving a will in which the Bank of America, N. T. & S. A., is named executor. On June 18, 1956, James Gallagher, acting as attorney for said bank, informed Henry C. Clausen, attorney for your petitioner, that said bank was unwilling to prosecute or continue this action on behalf of the Estate of said Alfred J. Lundberg; that on June 19, 1956, said bank filed a petition in said Alameda County Superior Court seeking probate of said will and requesting issuance to it of Letters Testamentary; and said petition is set for hearing in said Court on July 2, 1956. The decedent, Alfred J. Lundberg, did desire, however, as is evidenced by the copy of letter, dated May 13, 1953, attached hereto and by him handed to said Henry C. Clausen, that this action be carried, if necessary, to the ultimate appeal and forum.

Notwithstanding this action, said Bank of America moved the Alameda County Superior Court on June 21, 1956, for its order revoking the appointment of Paul W. Heisey as Special Administrator of said Estate; that said bank, through its said attorney of record, once again expressed its opposition to the continuation of this action by a representative of or

on behalf of said Estate of Alfred J. Lundberg; that said motion by said bank was nevertheless denied by said Court on June 21, 1956.

On June 19, 1956, by an order and decree of the Superior Court of the State of California, in and for the County of Alameda duly given and made, petitioner was appointed Special Administrator of the Estate of said Alfred J. Lundberg to prosecute and maintain the action above; that thereupon Special Letters of Administration were issued to petitioner, who thereupon duly qualified as Special Administrator of said Estate and entered upon the discharge of his duties as such Special Administrator; that said Special Letters of Administration have not been suspended, revoked, or discharged and petitioner is now the duly qualified and acting Special Administrator of the Estate of Alfred J. Lundberg, deceased, for the aforesaid purpose, and, as such Special Administrator, has been and now is expressly authorized by order of the said Alameda County Superior Court duly given and made to prosecute this action and to perfect any appeal in respect thereof on behalf of said deceased plaintiff, Alfred J. Lundberg; that by an order of said Alameda County Superior Court duly given and made, on June 19, 1956, petitioner as such Special Administrator, was substituted in the place of said Alfred J. Lundberg as plaintiff in this action.

That the said authority of petitioner as Special Administrator will expire on appointment of the general estate representative, set for July 2, 1956.

lso on June 19, 1956, petitioner as a citizen, resi-
t, taxpayer of said city, county and state, moved
l Court for an order bringing him in individually
a party plaintiff in this action; that by order of
l Court duly given and made on June 19, 1956,
itioner was brought in individually and made a
ty to this action and permitted to prosecute the
ne to a final conclusion as an additional plaintiff
ein; that pursuant to Rule 48(a), Rules on Appeal,
June 20, 1956, a certified copy of said order sub-
uting Paul W. Heisey as Special Administrator in
ce of Alfred J. Lundberg as plaintiff, and a certi-
copy of said order bringing said Paul W. Heisey
individually as an additional party plaintiff in this
ion were presented to this Court; that at said time
uest was made that this Court make like orders
stituting Special Administrator as a party and
nging said Paul W. Heisey in individually as a
ty on appeal.

That petitioner is a proper person to prosecute
s action, said Petition for Rehearing, or further
peal on behalf of himself and said citizens and resi-
nts and taxpayers similarly situated; that out of a
al of 4,804,533 votes cast in the 1952 referendum
ction in this case, 2,363,528 votes were cast against
d referendum; that there is thus illustrated the
le public interest on the part of the citizens, resi-
nts, and taxpayers of this state in establishing the
nstitutional invalidity of the 1951 Amendment to
venue and Taxation Code §214.

That by reasons of the steps already taken and threatened to be taken by said executor named in the will of said Alfred J. Lundberg, there is grave danger that unless petitioner individually is brought into this appeal forthwith and authorized to join in said Petition for Rehearing, and any further appeal or petition for certiorari, such action, the rights of appeal, and the rights under said judgment in favor of Alfred J. Lundberg and the said citizen, resident, taxpayers may be neglected, greatly damaged, or lost thereby.

Wherefore, petitioner prays for an order bringing him in and making him a party to this action on appeal, permitting him to join in respondent Alfred J. Lundberg's Petition for Rehearing, and any further appeal or petition for certiorari to the Supreme Court of the United States if said Petition for Rehearing be denied.

PAUL W. HEISEY,
Petitioner.

HENRY C. CLAUSEN,
Attorney for Petitioner.

State of California,
ty and County of San Francisco—ss.

Paul W. Heisey, being duly sworn, deposes and
ys:

That he is the Petitioner named in the foregoing
etition of Paul W. Heisey for Order Bringing Him
Individually, Making Him a Party to this Action
Appeal, and Permitting Him to Join in Respond-
t Alfred J. Lundberg's Petition for Rehearing.
hat he has read the foregoing Petition and knows the
ntents thereof and that the same is true of his own
nowledge except as to matters that are therein stated
his information or belief and as to those matters
believes it to be true.

Paul W. Heisey.

Subscribed and sworn to before me this 26th day of
ne, 1956.

(Seal)

Zaide Kirtley,
Notary Public in and for the City and
County of San Francisco, State of
California.

Appendix B

Henry C. Clausen
315 Montgomery Street
San Francisco 4, California
Telephone: YUkon 6-0727
Attorney for Plaintiff

Endorsed: Filed Jun. 19, 1956,
Jack G. Blue, County Clerk,
Frank X. Veit, Deputy.

In the Superior Court of the State of California
in and for the County of Alameda

No. 247,407

Department No. 1

Alfred J. Lundberg,
Plaintiff,

vs.

County of Alameda, City of Oakland, et al.,
Defendants.

The Roman Catholic Welfare Corporation of San Francisco, a (California) Corporation,
Intervenor.

AFFIDAVIT IN SUPPORT OF APPLICATION TO SUBSTITUTE PLAINTIFFS.

State of California,
County of Alameda—ss.

Paul W. Heisey, being first duly sworn, deposes and says:

That on June 14, 1956, after the commencement of this action, and while the same was still pending in this Court, the plaintiff herein, Alfred J. Lundberg, died in the City of Oakland, County of Alameda, State of California.

That on June 6, 1956, by a decision of the Supreme Court of the State of California duly given and made, the judgment in this case in favor of plaintiff was reversed; that prior to his said death, said Alfred J. Lundberg was seeking a rehearing in said case in the Supreme Court of the State of California and had authorized and instructed Henry C. Clausen, as his attorney of record in said case, to prepare and file a petition for said purpose; and that said petition had been substantially completed and approved by plaintiff prior to such date of death; and that said petition for rehearing is due to and must be filed in the Supreme Court of the State of California on or before June 21, 1956.

That petitioner is a proper person to prosecute said action, petition for rehearing, or further appeal on behalf of said Alfred J. Lundberg, and said taxpayers similarly situated; and there is danger that, unless appointed forthwith for said purpose, such action, the rights of appeal, and the rights under said judgment may be neglected, greatly damaged, or lost thereby.

That it is necessary that some person be authorized to prosecute said action, petition for rehearing, and any further appeal or petition for certiorari to the Supreme Court of the United States if said petition

for rehearing be denied, and petitioner is a proper person for such purpose and consents so to act.

[That at all times since January 1, 1950, affiant has been and now is the owner of real and personal property located in the City of Oakland, County of Alameda, State of California, and a citizen and resident and taxpayer thereof; and assessed for and liable to pay taxes thereon and therein, as provided by law; that affiant at all said times has been and is aggrieved and situated similarly as plaintiff, and one of the class of taxpayers for whom the action above was prosecuted by plaintiff and desires that every legal step be taken and exhausted on appeal to prosecute said action for all purposes and to a final determination.]

Paul W. Heisey.

Subscribed and sworn to before me this 19th day of June, 1956.

(Seal) Opal C. Hedge,
Notary Public in and for the County of Alameda, State of California.

My commission expires: 7-18-58.

Appendix C

Henry C. Clausen
315 Montgomery Street
San Francisco 4, California
Telephone: YUkon 6-0727
Attorney for Plaintiff

Endorsed: Filed Jun. 19, 1956,
Jack G. Blue, County Clerk,
Frank X. Veit, Deputy.

In the Superior Court of the State of California
in and for the County of Alameda

No. 247,407

Department No. 1

Alfred J. Lundberg,
Plaintiff,
vs.
County of Alameda, City of Oakland, et al.,
Defendants.

The Roman Catholic Welfare Corporation of San Francisco, a (California) Corporation,
Intervenor.

ORDER TO BRING IN PAUL W. HEISEY AS PLAINTIFF.

Paul W. Heisey, having moved this Court for its order bringing himself in as an additional plaintiff

in this action, the Court having heard the evidence, and the Court being fully advised:

It Is Therefore Ordered that said Paul W. Heisey be brought in and made a party to this action and permitted to prosecute the same to a final conclusion as an additional plaintiff herein.

Dated, June 19, 1956.

Charles Wade Snook,
Judge of the Superior Court.

No. 473. HEISEY *v.* COUNTY OF ALAMEDA ET AL. Appeal from the Supreme Court of California. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. MR. JUSTICE BLACK and MR. JUSTICE FRANKFURTER dissent. THE CHIEF JUSTICE took no part in the consideration or decision of this case. *Henry C. Clausen* for appellant. *Edmund G. Brown*, Attorney General of California, *Clarence A. Linn*, Assistant Attorney General, and *J. F. Coakley* for Alameda County et al., and *Andrew F. Burke* for the Roman Catholic Welfare Corporation of San Francisco, appellees. Reported below: 46 Cal. 2d 644, 298 P. 2d 1.